Docket for 02-458

No. 02-458 Status: ARGUED
Title: Raymond B. Yates, M.D., P.C., Profit Sharing Plan, and Raymond B. Yates, Trustee, Petitioners
v.
William T. Hendon, Trustee
Docketed: September 20, 2002
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (00-6023)
Decision Date: April 19, 2002
Rehearing Denied: June 20, 2002

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 18 2002	Petition for writ of certiorari filed. (Response due October 21, 2002)
Oct 21 2002	Brief of respondent William T. Hendon, Trustee in opposition filed.
Dec 2 2002	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 29 2003	Brief amicus curiae of United States filed.
Jun 27 2003	Petition GRANTED.
Aug 11 2003	Brief of petitioners Raymond B. Yates, M.D., P.C. Profit Sharing Plan, and Raymond B. Yates, Trustee filed.
Aug 11 2003	Joint appendix filed.
Aug 11 2003	Brief amicus curiae of United States filed.
Aug 11 2003	Brief amicus curiae of Unumprovident Corporation filed.
Sep 15 2003	Brief of respondent William T. Hendon, Trustee filed.
Sep 22 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 20 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 20 2003	Reply of petitioners Raymond B. Yates, M.D., P.C. Profit Sharing Plan, and Raymond B. Yates, Trustee filed.
Nov 3 2003	SET FOR ARGUMENT Tuesday, January 13, 2004.
Nov 4 2003	CIRCULATED.
Nov 18 2003	Record received from the U.S.C.A. for the Sixth Circuit. (1 binder)
Nov 20 2003	Record received from the U.S.D.C. for Eastern Dist. of Tennessee (1 envelope)
Jan 13 2004	Argued. For petitioners: James A. Holifield, Jr., Knoxville, Tenn.; and on behalf of the United States, as amicus curiae, Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: C. Mark Troutman, LaFollette, Tenn.
Jan 20 2004	Letter from the Solicitor General received and distributed.

FILED
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No.

In the

Supreme Court of the United States

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act ("ERISA") expressly grants sole shareholder corporations, partners and sole proprietors the right to be "participants" in an "employee benefit plan", as those terms are defined in ERISA, if other non-spouse employees participate in the employee benefit plan. Nine circuit courts of appeals and the Department of Labor ("DOL") have reviewed ERISA, and its regulations, and reached the same conclusion. This Court's holding in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), provides that the common-law definition of employee should be used to determine who may be a "participant" in an employee benefit plan. Nonetheless, the Sixth Circuit held in *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002) (Appendix, pp. 1a-8a, 51a-52a), that a different definition of "employee" should be used to determine whether such persons can participate in an employee benefit plan.

The question presented is whether a one hundred percent (100%) shareholder of a corporate employer, partner or a sole proprietor can qualify as a participant in an employee benefit plan sponsored by the employer in which other non-spouse employees, as defined in 29 C.F.R. § 2510.3-3(c), participate, and thus, be entitled to enforce the restrictions against alienation contained in § 206(d) of ERISA and § 401(a)(13) of the Internal Revenue Code ("Code").

PARTIES

PETITIONERS - APPELLANTS

(1) Raymond B. Yates, M.D., P.C. Profit Sharing Plan

(2) Raymond B. Yates, Trustee

RESPONDENT - APPELLEE

(1) William T. Hendon, Bankruptcy Trustee

STATEMENT PURSUANT TO RULE 29.6

Petitioner Raymond B. Yates, M.D., P.C. Profit Sharing Plan states that it has no corporate parents, and that no publicly held company owns 10% or more of Raymond B. Yates, M.D., Profit Sharing Plan's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Judgment and Memorandum of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, Adversary Proc. No. 98-3088, granting the Respondent's Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment has not been officially reported but is contained in the record (R. 23 and 24, Memorandum Opinion and Judgment) (Appendix, pp. 36a-50a). The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, affirming the Bankruptcy Court's decision has not been officially reported but is contained in the record (R. 10 and 11, Memorandum Opinion and Order) (Appendix, pp. 9a-36a). The opinion of the Court of Appeals for the Sixth Circuit affirming the District Court opinion is published at 287 F.3d 521 (6th Cir. 2002) (Appendix, pp. 1a-8a). The order of the Court of Appeals for the Sixth Circuit denying rehearing en banc is published at 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002) (Appendix, pp. 51a-52a).

STATEMENT OF JURISDICTION

The opinion of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, granted Respondent's Motion for Summary Judgment and denied Petitioners' Motion for Summary Judgment. This decision was affirmed by the United States District Court for the Eastern District of Tennessee on June 26, 2001. On April 19, 2002 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. Petitioners filed a Petition for Rehearing En Banc with the Sixth Circuit Court of Appeals, which was

denied on June 20, 2002. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The statutory and regulatory provisions of the ERISA, 29 U.S.C. § 1001 *et seq.* and the Internal Revenue Code relevant to this Petition are reprinted in the Appendix at pages 53a-68a.

STATEMENT OF THE CASE

Raymond B. Yates, M.D., P.C. is a professional corporation (the "Yates, P.C."), wholly owned by Petitioner Dr. Yates. On July 20, 1989, Yates, P.C. created a profit sharing/pension plan (the "Plan"), which was an "employee benefit plan" as defined in ERISA § 3(2) [29 U.S.C. § 1002(2)] and qualified for tax purposes under Code § 401 [26 U.S.C. § 401]. In addition to being the sole owner of Yates, P.C. and the administrator and trustee of the Plan, Dr. Yates participated in the Plan as an employee. From the time of its inception, the Plan always had at least one additional participant who was not related to Dr. Yates. As of June 30, 1996, in addition to Dr. Yates, there were three participants in the Plan, none of whom were related to Dr. Yates.

In his capacity as an employee-participant in the Plan, Dr. Yates borrowed against his interest in the Plan under the "Model Loan Program" which was incorporated into the Plan by the Adoption Agreement.[1] On December 13, 1989, Dr. Yates executed a promissory note in the principal amount of $20,000.00[2] at an eleven percent rate of interest until default

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[1] Section 14 of the Adoption Agreement permitted the Plan to establish a participant loan program. The particular loan program adopted by the Plan was entitled "Model Loan Program," and was attached to the Adoption Agreement as an exhibit.

[2] Dr. Yates originally borrowed from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan. The loan transferred to the Profit Sharing Plan in 1992, when the Money Purchase Pension Plan merged into the Profit Sharing Plan.

and a five-year repayment period, which was extended for another five years on June 12, 1992. Also on December 13, 1989, Dr. Yates executed an irrevocable pledge and assignment to secure the indebtedness to be repaid under the promissory note. In the irrevocable pledge and assignment, Dr. Yates pledged and assigned to the trustee of the Plan an interest in his vested employer account balance. The Plan also includes a "spendthrift clause" that protects the assets of the Plan from assignment or alienation as provided in ERISA § 206(d) [29 U.S.C. § 1056(d)] (Appendix, pp. 62a-68a) and Code § 401(a)(13) [26 U.S.C. § 401(a)(13)] (Appendix, pp. 56a-58a).[3]

In November 1996, Dr. Yates repaid the entire debt to the Plan by making two payments. Together, the payments totaled $50,467.46 and represented the total amount of principal and interest due under the promissory note. After these repayments, Dr. Yates' interest in the Plan was approximately $87,000. On December 2, 1996, an involuntary petition under Chapter 7, Title XI of the United States Code was filed against Dr. Yates. Dr. Yates claimed his entire interest in the Plan as exempt property on Schedule B of his bankruptcy schedules under ERISA, the Internal Revenue Code and Tenn. Code Ann. § 26-2-104(b).

On August 5, 1998, the Respondent filed an adversary proceeding against the Plan and Dr. Yates, as the Plan's trustee, seeking to avoid the $50,467.46 loan repayments by Dr. Yates to the Plan in November, 1996 as a preference under 11 U.S.C. § 547(b). However, the Plan and Dr. Yates, as the Plan's trustee, asserted that the Respondent could not recover these payments because they represented Dr. Yates' interest in an ERISA-qualified plan and were excluded from his bankruptcy estate.

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[3] There are two exceptions to the anti-alienation provisions of the Plan which are not issues in this case. One exception is a loan from the Plan, and the second is for a qualified domestic relations order as defined in Code § 414(p) [26 U.S.C. § 414(p)].

The parties to the adversary proceeding filed cross motions for summary judgment. The Bankruptcy Court granted the Respondent's Motion for Summary Judgment and denied the Plan's and Dr. Yates' Motion for Summary Judgment. (Appendix, pp. 36a-50a). Specifically, the Bankruptcy Court ruled that the Respondent could recover the November 1996 payments Dr. Yates made to the Plan because Dr. Yates was not eligible to participate in the Plan. The Bankruptcy Court held that "[t]he Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest in the Defendant Plan." (Appendix, pp. 43a-44a). This holding was based on the decision of the Sixth Circuit Court of Appeals in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993), which held that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Id.* at 186.

The United States District Court for the Eastern District of Tennessee, at Knoxville, affirmed the decision of the Bankruptcy Court and further stated that "[w]hile the Plan may be ERISA-qualified as to other participants, the court found it is not ERISA-qualified as to Dr. Yates". (Appendix, p. 14a).[4] On April 19, 2002, the Court of Appeals for the Sixth Circuit affirmed the decisions of the lower courts stating that "[u]nder circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA. Neither is the spendthrift clause enforceable under Tennessee statutory law." (Appendix, pp. 6a-7a). The Sixth Circuit also held that:

> Our published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992). As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000). The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms. *Agrawal*, 205 F.3d at 302.

[4] There is no basis in ERISA to conclude that one employee benefit plan would have two groups of participants (owners and non-owners) in the same plan but be subject to two different legal enforcement schemes.

(Appendix, p. 5a).

The Petitioners timely filed a Petition for Rehearing En Banc, which was denied by the Court of Appeals for the Sixth Circuit on June 20, 2002. *Yates*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). (Appendix, pp. 51a-52a). The Petitioners file this Petition for Writ of Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I. There is a conflict between the Circuit Courts of Appeals as to whether a 100% shareholder, partner or sole proprietor can be a "participant" in an employee benefit plan.

The decision in *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), conflicts with the decisions of nine other circuit courts, as well as opinion letters from the United States Department of Labor.[5] The only other circuit

[5] *Schwartz v. Gordon*, 761 F.2d 864 (2nd Cir. 1985); *Leckey v. Stefano*, 263 F.3d 267 (3rd Cir. 2001); *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352 (3rd Cir. 1999); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th

court to agree with the Sixth Circuit on the issue presented in this case is the First Circuit Court of Appeals,[6] which also held that a business owner, such as Dr. Yates, cannot be a participant in an employee benefit plan because of his dual role of employer and employee. Therefore, there are two Circuit Courts of Appeals that agree that individuals such as Dr. Yates cannot be a participant in an employee benefit plan because of their dual role as employer and employee and nine Circuit Courts of Appeals that have determined that individuals such as Dr. Yates can be a participant in an employee benefit plan based on a plain reading of 29 C.F.R. § 2510.3-3.

The decision of the Sixth Circuit in *Yates* was based on the Sixth Circuit's prior decisions in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993), and *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000), *reh'g denied*, 2000 U.S. App. LEXIS 6844 (6th Cir. April 6, 2000). The Sixth Circuit recognized the problems with the reasoning in the *Fugarino* decision when it stated in *Agrawal*, "[a]lthough the decision in the present case is preordained by the *Fugarino* holding, we note that the reasoning underlying the *Fugarino* decision is not thoroughly consistent with the goals of ERISA." *Agrawal*, 205 F.3d at 302. The Sixth Circuit further stated in *Agrawal* that "[t]his limiting definition of employee [referring to 29 C.F.R. § 2510.3-3(c)(1)] addresses the threshold issue of whether an ERISA plan exists. It is not consistent with the purpose of ERISA to apply this limiting definition of employee to the

Cir. 1999); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001); *Watson v. Proctor (In re Watson)*, 161 F.3d 593 (9th Cir. 1998); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001); *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); ERISA Opinion Letter 79-08A, Jan. 30, 1979; and ERISA Opinion Letter 99-04A, Feb. 4, 1999.

[6] *Kwatcher v. Mass. Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989).

statutory definitions of participant and beneficiary." *Agrawal*, 205 F.3d at 303.[7]

A. <u>The holding in *Yates* conflicts with a plain reading of ERISA.</u>

The holding in *Yates* is based on an incomplete reading and misapplication of the provisions of 29 C.F.R. § 2510.3-3(c)(1). (Appendix, p. 53a). Section 2510.3-3 is entitled "Employee Benefit Plan" and serves only to "clarify the definition in section 3(3) of the term 'employee benefit plan' [29 U.S.C. § 1002(3)] for purposes of title I of the Act and this chapter." 29 C.F.R. § 2510.3-3(a) (Appendix, p. 53a). Section (b) of this regulation defines plans without employees and provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . . ." *Id.* (Appendix, p. 53a). Section (c) sets forth the definition of "employee" for purposes of determining whether the employee benefit plan has employees. An individual or his or her spouse are not deemed to be "employees" of an employer that is wholly owned by the individual or by the individual and his or her spouse for the purpose of determining if an "employee benefit plan" exists. (Appendix, p. 53a). Therefore, if the only participants of an employee benefit plan are the owner and his or her spouse, that plan does not meet the definition of an "employee benefit plan" under ERISA. However, if the employee benefit plan benefits employees other than the sole owner (and his or her spouse), the plan meets the definition of "employee benefit plan" and

[7] The Sixth Circuit, in *Fugarino* and *Yates*, held that the definition of "employee" in 29 C.F.R. § 2510.3-3(c)(1) is also determinative of who is considered an "employee" for purposes of the definition of "participant" found in ERISA § 3(7) [29 U.S.C. § 1002(7)] (Appendix, pp. 61a-62a). The definition of "employee" is found in ERISA § 3(6) [29 U.S.C. § 1002(6)]. (Appendix, p. 61a). This Court, in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), held that the common-law definition of "employee" is to be used to determine whether a person is an "employee" for purposes of ERISA § 3(6) [29 U.S.C.§ 1002(6)]. The *Yates* decision conflicts with the holding of *Darden* and is addressed later in this Petition.

is entitled to all the protections of ERISA, including those contained in the anti-alienation provisions. *29 C.F.R. § 2510.3-3* (Appendix, pp. 53a-55a). The preceding regulation is not determinative of whether an individual is an "employee" or a "participant" in an employee benefit plan. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

Nine other circuits, as argued above, have interpreted 29 C.F.R. § 2510.3-3(c)(1) to apply only to the determination of whether an "employee benefit plan" exists, not to the question of whether an individual can be a "participant" in an employee benefit plan. These circuits have interpreted this regulation to mean that an employee benefit plan exists if the plan benefits "employees" other than the sole owner of the corporation, a partner or a sole proprietor. *Cf.*, *Schwartz v. Gordon*, 761 F.2d 864 (2nd Cir. 1985); *Leckey v. Stefano*, 263 F.3d 267 (3rd Cir. 2001); *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352 (3rd Cir. 1999); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001); *Watson v. Proctor (In re Watson)*, 161 F.3d 593 (9th Cir. 1998); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001); and *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999). The holding of the Sixth Circuit in *Yates* is in conflict with the holdings of the above cases. For this reason, this case accordingly merits this Court's review.

B. <u>The holding in *Yates* conflicts with Department of Labor Advisory Opinions.</u>

In ERISA Opinion Letter 79-08A, the Department of Labor ("DOL") was asked whether the employed wife of the owner of a company was eligible to be a participant in an employee benefit plan sponsored by the company. In

rendering its opinion that the wife was a participant in the plan, the DOL stated that 29 C.F.R. § 2510.3-3:

> is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

ERISA Opinion Letter 79-08A, Jan. 30, 1979.

The DOL has also issued an advisory opinion recognizing that "working owners" of businesses can be participants in employee benefit plans. In ERISA Opinion Letter 99-04A, the DOL addressed the issue of whether individuals who own business enterprises, either as sole proprietors, partners or shareholders, and who provide personal services to those businesses can be "participants" in an employee benefit plan under ERISA. In concluding that such individuals could be participants, the DOL stated:

> In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended

> that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).
>
> ERISA Opinion Letter 99-04A, Feb. 4, 1999.

For the above reasons, this case warrants this Court's review.

II. The issue presented in this Petition is an important question of federal law that has not been, but should be, settled by this Court.

The issue presented in *Yates* has been reviewed by eleven Circuit Courts of Appeals and specifically addressed by the DOL in two opinion letters. However, this Court has not ruled on the issue presented in *Yates*. It is Petitioner's belief that this Court should grant this Petition so that the issue presented in *Yates* may be resolved. Currently, nine circuit courts and the DOL disagree with the interpretation of 29 C.F.R. 2510.3-3 set forth by the First and Sixth Circuit Courts of Appeals. Accordingly, this case merits review by this Court to resolve the conflict among the circuits and address this important area of federal law.

III. The holding by the Sixth Circuit Court of Appeals in *Yates* conflicts with the decision of this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

The decision in *Yates* conflicts with this Court's holding in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). In *Darden*, this Court adopted a common-law test for determining who is an "employee" under ERISA § 3(6) [29 U.S.C. § 1002(6)]. (Appendix, p. 61a). The definition of "employee" is important because this term is used to determine who can be a "participant", as defined ERISA 3(7) [29 U.S.C. § 1002(7)]. (Appendix, pp. 61a-62a). However, the Sixth Circuit, in *Yates*, misapplied the limiting definition of "employee" as stated in 29 C.F.R. § 2510.3-3(c)(1) (Appendix, pp. 53a-55a), which is used only to clarify the definition of "employee benefit plan," to determine who can be a "participant" in an "employee benefit plan".[8] This Court held in *Darden* that the common-law definition of employee should be used to determine who can be an employee, and therefore, a participant in an employee benefit plan. The *Yates* holding directly conflicts with the holding in *Darden*. The holding in *Yates* will have a significant impact on entities owned by 100% shareholders, partners and sole proprietors by denying them the protections of ERISA and the Internal Revenue Code that are afforded to similar business owners in nine other circuits and all other employees participating in employee benefit plans. This is the exact "absurd result" that the DOL warned against. For these reasons, this Court should grant this Petition and review the holding of *Yates*.

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[8] 29 C.F.R. § 2510.3-3 (Appendix, pp. 53a-55a) is entitled "Employee Benefit Plan" and provides that "[t]his section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter." *Id.* Nothing in this regulation indicates or implies that this regulation is to be relied upon to determine who can be a "participant" in an employee benefit plan.

CONCLUSION

There is a clear split of authority between the circuits over whether a sole owner and employee of a corporate employer, partner or a sole proprietor can be a participant in an employee benefit plan sponsored by that same employer. This question is likely to recur; therefore, this Petition should be granted in order to resolve the conflict between the circuits.

This issue is also an important question of federal law. As the ultimate expounder of federal law, this Court should grant this Petition in order to address the question presented herein.

For the foregoing reasons, Petitioners respectfully request that this Petition be granted and that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-6023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: RAYMOND B. YATES, Debtor. WILLIAM T. HENDON, Trustee, Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan; RAYMOND B. YATES, Trustee, Defendants-Appellants.

October 23, 2001, Argued

April 19, 2002, Decided

April 19, 2002, Filed

COUNSEL:
ARGUED: William S. Lockett, Jr., KENNERLY, MONTGOMERY & FINLEY, Knoxville, Tennessee, for Appellants.

Conrad M. Troutman, TROUTMAN & TROUTMAN, LaFollette, Tennessee, for Appellee.

ON BRIEF: James A. Holifield, Jr., KENNERLY, MONTGOMERY & FINLEY, Knoxville, Tennessee, for Appellants.

Conrad M. Troutman, TROUTMAN & TROUTMAN, LaFollette, Tennessee, for Appellee.

JUDGES:
Before: NELSON, CLAY, and GARWOOD, Circuit Judges.

OPINIONBY:
DAVID A. NELSON

OPINION:

DAVID A. NELSON, Circuit Judge. The question here is whether a Chapter 7 bankruptcy trustee was entitled to a court order setting aside as a voidable preference a loan repayment made by an insolvent debtor to his wholly-owned corporation's profit sharing/pension plan only three weeks before an involuntary bankruptcy petition was filed against the debtor. Both the bankruptcy court and the district court determined that the trustee in bankruptcy was entitled to have the repayment set aside, thereby increasing the amount of money available for creditors.

Pursuant to the Employee Retirement Income Security Act (ERISA), the profit sharing/pension plan contained a spendthrift clause providing that except for loans to participants, no interest available under the plan would be subject to voluntary or involuntary alienation or assignment. The plan and its trustee (the debtor wearing a fiduciary hat) contend that this restraint on alienation was enforceable under both ERISA (see *29 U.S.C. § § 1132*(a)(3) and (5)) and a Tennessee statute, Tenn. Code Ann. § 26-2-105(b). Therefore, argue the appellants, the money in question was not subject to recapture by the trustee in bankruptcy, given the Bankruptcy Code provision *(11 U.S.C. § 541*(c)(2)) that says a restraint on alienation of a debtor's beneficial interest in a trust is enforceable in a bankruptcy case if enforceable under applicable nonbankruptcy law.

We conclude that neither ERISA nor the Tennessee statute was applicable on the facts presented. Accordingly, we shall affirm the decision entered in favor of the trustee in bankruptcy.

I

The debtor, Dr. Raymond B. Yates, was the sole owner of a corporation known as Raymond B. Yates, M.D., P.C. The corporation maintained a profit sharing/pension plan that

was tax-qualified under *§ 401 of the Internal Revenue Code*. Dr. Yates was the plan's administrator and trustee. As of June 30, 1996, four people had been designated as participants in the plan. Dr. Yates was one of the four.

In December of 1989 Dr. Yates borrowed $ 20,000 from the plan at 11 percent interest. The loan was supposed to be repaid in monthly installments over a five year period, but Dr. Yates failed to make the monthly payments.

In June of 1992 the term of the loan was extended for five years. Still no monthly installments were paid. In mid-November of 1996, however, at a time when he must be presumed to have been insolvent (see *11 U.S.C. § 547*(f)), Dr. Yates used proceeds of a house sale to make payments to the plan in amounts totaling $ 50,467.46. This figure represented repayment of the loan in full, with accrued interest.

On December 2, 1996 - three weeks after the repayment - an involuntary bankruptcy petition was filed against Dr. Yates under Chapter 7, Title 11, of the United States Code. Eight months later the trustee in bankruptcy commenced an adversary proceeding against the plan and its trustee under *11 U.S.C. § § 547*(b) and 550. The complaint asked the court to (a) set the repayment aside as a preferential transfer and (b) order that the money be paid over to the bankruptcy trustee. It is undisputed that the $ 50,467.46 transfer made to the plan in November, 1996, qualified as a preference under *11 U.S.C. § 547*.

On cross-motions for summary judgment the bankruptcy court entered a judgment granting the relief sought in the bankruptcy trustee's complaint. The district court affirmed, and this appeal followed.

II

The Bankruptcy Code provides that, as a general rule, all property interests of a bankrupt debtor must be turned over to the trustee in bankruptcy for the benefit of creditors. *11 U.S.C. § 541*(a)(1). *Cf. In re Wilcox, 233 F.3d 899, 901 (6th Cir. 2000)*.

As we have seen, *11 U.S.C. § 541*(c)(2) carves out an exception to the general rule. Section 541(c)(2) reads as follows:

"A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

The Yates profit sharing/pension plan is a trust that contains a restriction on the transfer of participants' beneficial interests. The restriction, captioned "Spendthrift Clause," is couched in the following terms:

"Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, *no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily.* The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in Section 414(p) of the Code, or any domestic relations order entered before January 1, 1985." (Emphasis supplied.)

Is this spendthrift clause "enforceable under applicable nonbankruptcy law" within the meaning of that phrase as used in *11 U.S.C. § 541*(c)(2)? If it is, the courts below erred in requiring that the money Dr. Yates put into the plan on the eve of his bankruptcy be assigned to the bankruptcy trustee for the benefit of Dr. Yates' creditors. If the clause is not enforceable under applicable nonbankruptcy law, however, the courts below did not err in holding that the trustee in bankruptcy was entitled to the money.

Dr. Yates cites two separate bodies of nonbankrtupcy law that are, in his submission, applicable: ERISA and the Tennessee Code. We consider each in turn.

A

ERISA contains a provision stating that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *29 U.S.C. § 1056*(d)(1). This provision "clearly imposes a 'restriction on the transfer' of a debtor's 'beneficial interest' in the trust." *Patterson v. Shumate, 504 U.S. 753, 759, 119 L. Ed. 2d 519, 112 S. Ct. 2242 (1992).* The Yates plan contained a restriction of the sort prescribed, and one might suppose that Dr. Yates would be entitled to bring a civil action under ERISA to enforce its terms. See *29 U.S.C. § 1132*(a)(3)(B)(ii), which provides that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan."

If one supposed that Dr. Yates could obtain judicial enforcement of the terms of the plan under ERISA in the Sixth Circuit, however, one would be wrong. Our published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 186 (6th Cir. 1992).* As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co., 205 F.3d 297 (6th Cir. 2000).* The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms." *Agrawal, 205 F.3d at 302.*

In their opening brief on appeal, the appellants argue that the *Fugarino* decision departs from a plain reading of ERISA, conflicts with advisory opinions of the Department of Labor, and is contradicted by the caselaw of eight other circuits. But these arguments belong in a petition for rehearing en banc; the three judge panel before which this appeal is currently pending has no authority to overrule *Fugarino*. See 6th Cir. R. 206(c), which reads as follows:

"Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a

previous panel. Court en banc consideration is required to overrule a published opinion of the court."

To the same effect see *Valentine v. Francis, 270 F.3d 1032, 1035 (6th Cir. 2001); United States v. Dunlap, 209 F.3d 472, 481 (6th Cir. 2000); United States v. Washington, 127 F.3d 510, 516-17 (6th Cir. 1997);* and *United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996).*

Finally, the appellants argue that *Fugarino* was overruled by the Health Insurance Portability and Accounting Act of 1996, which enacted *29 U.S.C. § 1191a.* That section, captioned "Special rules relating to group health plans," provides among other things that "in the case of a group health plan, the term 'participant' also includes . . . [a] self employed individual, if such individual is, or may become, eligible to receive a benefit under the plan . . . ." *29 U.S.C. § 1191a*(d)(3).

The appellants' § 1191a(d)(3) argument has at least two obvious flaws:

(1)The Yates profit sharing plan is not a group health plan, and

(2)the published decision in *Agrawal* - which is no less binding on this panel than the published opinion in *Fugarino* - was issued some three and a half years after the enactment of § 1191a(d)(3). And see *Securities and Exchange Commission v. Johnston, 143 F.3d 260, 262 (6th Cir. 1998),* a post-1996 decision accepting the argument that "ERISA does not apply to any [profit sharing/pension] plan to the extent it benefits the sole owner of a business and his or her spouse."

Under circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA.

B

Neither is the spendthrift clause enforceable under Tennessee statutory law. The Tennessee Personal Property Owner's Rights and Garnishment Act of 1978, on which the appellants rely, contains a section providing (subject to an exception not relevant here) as follows:

"any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under § § 401(a), 403(a), 403(b), 408 and *408A of the Internal Revenue Code* of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee. All records of the debtor concerning such plan and of the plan concerning the debtor's participation in the plan, or interest in the plan, are exempt from the subpoena process." Tenn. Code Ann. § 26-2-105(b). (Prior to 2000, this section was codified at Tenn. Code Ann. § 26-2-104(b).)

By its terms, this is an exemption statute; that is, it purports to make property exempt from the claims of creditors. The statute contains no direct reference to any retirement plan language imposing a restriction on the transfer of a beneficial interest in the plan, and it does not purport to make any provision of the plan enforceable as such. Like the Pennsylvania exemption statute considered by the court in *In re Lowenschuss, 171 F.3d 673 (9th Cir. 1999),* the Tennessee exemption statute "operates without regard to a transfer restriction that may be contained in the trust instrument." *Id. at 682.*

Nonbankruptcy law that does not purport to provide for the enforcement of a restriction contained in the trust instrument is not the sort of nonbankruptcy law of which the Bankruptcy Code speaks in *11 U.S.C. § 541*(c)(2). The text of § 541(c)(2) is notable for its "clarity," see *Patterson v. Shumate, 504 U.S. at 760,* and "we must enforce the statute according to its terms." *Id. at 759.* The appellants would have us go well beyond the literal terms of § 541(c)(2); this we decline to do.

We readily acknowledge that caselaw from two of our sister circuits, the Third and the Eleventh, suggests that those circuits would make the opposite call here. See *In re Yuhas, 104 F.3d 612, 614 (3d Cir. 1997)*, and *In re Meehan, 102 F.3d 1209, 1211-12 (11th Cir. 1997)*. With respect, however, it seems to us, for reasons already suggested, that we would be usurping a legislative role were we to read § 541(c)(2) as meaning anything other than what it plainly says.

The power to claim an exemption, after all, is personal to the debtor. See *In re Noblit, 72 F.3d 757, 758 (9th Cir. 1995)*, *In re Everhart, 11 B.R. 770, 772 (N.D. Ohio 1981)*, and *In re Sanders, 213 B.R. 324, 329 (M.D. Tenn. 1997)*. As debtor, Dr. Yates has not claimed the exemption. Dr. Yates as trustee of the plan would like to claim an exemption on behalf of Dr. Yates as beneficiary/debtor, but he is not entitled to do so. See *In re Ross, 18 B.R. 364 (N.D. N.Y. 1982)*.

The appellants have not argued that the spendthrift clause in the Yates plan is enforceable at common law or in equity, under Tennessee jurisprudence, so it is not incumbent on us to opine on that question.

AFFIRMED.

Footnotes

Fn1 The Honorable Will L. Garwood, United States Circuit Judge for the Fifth Circuit, sitting by designation.

No. 3:99-CV-600
Judge Curtis L. Collier

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, Trustee,
Defendants-Appellants.

Filed June 26, 2000

MEMORANDUM

This case is before the Court on appeal from the United States Bankruptcy Court for the Eastern District of Tennessee. Defendants-Appellants Raymond B. Yates, M.D., P.C., Profit Sharing Plan and Raymond B. Yates, Trustee, appeal the Bankruptcy Court's grant of summary judgment to Plaintiff-Appellant William T. Hendon, Trustee (Rec. 15). For the reasons stated below, the Court will AFFIRM the decision of the Bankruptcy Court.

I. STANDARD OF REVIEW

Jurisdiction to hear appeals from bankruptcy court is conferred by 28 U.S.C. § 158. In determining appeals from bankruptcy court, this Court sits as an appellate court, reviewing the bankruptcy court's findings of fact under a

clearly erroneous standard, but conducting a de novo review of the bankruptcy court's conclusions of law. Fed. R. Bankr. P. 8013; In re Baker and Getty Financial Services, Inc., 106 F.3d 1255, 1259 (6th Cir. 1997); Harbor Lights Marina v. Wandstrat, 153 B.R. 781 (Bankr. S.D. Ohio 1993). However, the Court may overturn matters within the discretion of the bankruptcy court only for an abuse of discretion. Fed. R. Bankr. P. 8003; American Imaging Services, Inc. v. Eagle-Picher Industries, Inc. (In re Eagle-Picher Industries, Inc.), 963 F.2d 855, 858 (6th Cir. 1992); accord Investors Credit Corp. v. Batie, 995 F.2d 85, 88 (6th Cir. 1993).

II. FACTUAL BACKGROUND

Raymond B. Yates, M.D., P.C. is a professional corporation (the "Corporation"), wholly owned by Debtor Raymond B. Yates ("Dr. Yates"). On July 20,1989, the Corporation created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the "Plan"), by executing an Adoption Agreement. fn1 Dr. Yates signed the Adoption Agreement in his capacity as president of the Defendant-Appellant Corporation, and in his capacity as trustee of the Defendant-Appellant Plan. By letter dated May 10, 1990, the Internal Revenue Service informed Dr. Yates in his capacities as administrator and trustee the Plan was "acceptable under § 401 of the Internal Revenue Code for use by employers for the benefit of employees" (Rec. 7, Exh. B). fn2

In addition to being the sole owner of the corporation, and the administrator and trustee of the Plan, Dr. Yates participated in the Plan as an employee. From the time of its inception, the Plan always had at least one additional participant, who was not related to Dr. Yates. As of June 30, 1996, in addition to Dr. Yates, there were three participants in the Plan. None of the other three participant employees was related to Dr. Yates.

In his capacity as an employee participant in the Plan, Dr. Yates borrowed against his interest in the Plan under the "Model Loan Program" which was incorporated into the Plan

by the Adoption Agreement. fn3 On December 13, 1989, Dr. Yates executed a Promissory Note in the principal amount of $20,000.00 (Rec. 7, Exh. C). fn4 The terms of the loan provided for an eleven percent rate of interest until default and a five-year repayment period, which was extended for another five years on June 12, 1992 (Rec. 13). On December 13, 1989, Dr. Yates also executed an Irrevocable Pledge and Assignment to secure the indebtedness to be repaid under the Promissory Note (Rec. 7, Exh. C). In the Irrevocable Pledge and Assignment, Dr. Yates pledged and assigned to the trustee of the Plan "the Vested Employer Account Balance, at any time existing under the Plan, necessary to satisfy the loan which is the subject of this pledge, any unpaid interest on such loan, all attorneys' fees [sic] necessary for collection of this obligation and all costs of collection" (Rec. 7, Exh. C).

Although the terms of the loan required Dr. Yates to make monthly payments in the amount of $433.85 (Rec. 13), Dr. Yates failed to make regular payments on the Promissory Note and it remained outstanding until November 1996. in that month he paid off the entire debt by making two payments to the Plan. On November 12, 1996 he paid $38,000.00 and on November 13, 1996, he paid $12,467.46. Together, the payments totaled $50,467.46 and represented the amount of principal and interest due under the Promissory Note. Dr. Yates used the proceeds from the October 1996 sale of his home to make the repayments. After these repayments, Dr. Yates's interest in the Plan was approximately $87,000 (Rec. 14, at 5).

Article 18.02 of the Basic Plan Document #01, which forms an integral part of the Plan, is a "spendthrift clause" which provides as follows:

Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable

with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in § 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

(Rec. 7, Exh. A, at 18-1.)

On December 2, 1996, an involuntary petition under Chapter 7, Title 11 of the United States

Code (the Bankruptcy Code) was filed against Dr. Yates. Dr. Yates claimed an $89,000 interest in the Plan as exempt property on Schedule C of his bankruptcy schedules (Rec. 8, attach.). He claimed this exemption under Tenn. Code Ann. § 26-2-104(b), which states:

[A]ny funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 401(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.

Tenn. Code Ann. § 26-2-104(b).

On August 5, 1998 the Bankruptcy Trustee filed an adversary proceeding against the Plan and Dr. Yates, as the Plan's trustee, seeking to avoid the $50,467.46 in loan repayments Dr. Yates had made to the Plan in November of 1996, less than 90 days prior to filing of the bankruptcy petition. The Bankruptcy Trustee asserted that Dr. Yates was insolvent at the time of the transfer, that the transfer enabled the Plan, as a creditor, to receive more than it would receive under the Bankruptcy Code had the transfer not been made, and that the repayments were therefore avoidable transfers under 11 U.S.C. § 547(b) (Rec. 1). fn5 The Plan and Dr. Yates in his capacity as trustee asserted the Trustee could not recover the repayments because the money the Trustee sought to recover

represented part of Dr. Yates's interest in a qualified retirement plan and was excluded from his bankruptcy estate (Rec. 2).

The parties to the adversary proceeding filed cross motions for summary judgment. The Bankruptcy Court issued a Memorandum on Cross Motions for Summary Judgment on September 2, 1999, granting the Chapter 7 Trustee's motion and denying the Defendants' motion. The Bankruptcy Court ruled the Trustee had established all of the elements required by 11 U.S.C. § 547(b) concerning the avoidability of a preferential transfer. Dr. Yates's interest in the Plan was not qualified under the Employee Retirement Income Security Act of 1974,29 U.S.C. §§ 1001, et seq. ("ERISA"), and no provisions of either ERISA or State law barred the Trustee from recovering the loan repayments made by Dr. Yates to the Plan. Since Dr. Yates's interest in the pension plan was a part of the bankruptcy estate, the Trustee could avoid the November 1996 repayments and recover the $50,467.46 from the Plan (Rec. 14). Judgment entered September 2, 1999, ordering avoidance of the $50,467.46 (Rec. 15).

On appeal Appellants raise four issues:

A. Whether the Bankruptcy Court erred in concluding the Defendant-Appellant Plan is not ERISA-qualified.

B. Whether the Bankruptcy Court erred in concluding Dr. Yates cannot be a participant in the Defendant-Appellant Plan, and that Dr. Yates is ineligible to benefit from the protections of ERISA.

C. Whether the Bankruptcy Court erred in concluding the Chapter 7 Trustee may recover from the Plan under 11 U.S.C. § 550, avoidable transfers made by Dr. Yates, in light of an ERISA restriction on alienation of Dr. Yates's interest in the plan.

D. Whether the Bankruptcy Court erred in concluding the Chapter 7 Trustee may recover from the Plan under 11

U.S.C. § 550, avoidable transfers made by Dr. Yates, in light of a restriction on alienation of Dr. Yates's interest in the Plan set forth in Tennessee Code Annotated § 26-2-104(b).

III. DISCUSSION

A. Whether the Plan is ERISA-qualified

The Plan and Dr. Yates in his capacity as trustee contend the Bankruptcy Court found the Plan is not ERISA-qualified. Neither party had raised as an issue the question of whether the Plan was ERISA-qualified. In fact, both parties agreed the Plan was ERISA-qualified. Appellants further contend the issue of whether the Plan is ERISA-qualified is one of material fact. Summary Judgment can be granted only when there are no material issues of fact in dispute. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Thus, Appellants argue, Summary Judgment was inappropriate.

Upon review of the Bankruptcy Court's decision, the Court concludes the Bankruptcy Court did not make such a broad holding. The Bankruptcy Court simply found Dr. Yates's particular interest in the Plan did not allow him to assert the protections available under ERISA.

On page thirteen of its Memorandum the Bankruptcy Court states, "the Debtor's interest is not a spendthrift trust or an ERISA-qualified plan." Earlier in the Memorandum the Bankruptcy Court found Dr. Yates could not participate in the Plan as an employee under ERISA (Rec. 14, at 10). The court's statement that Dr. Yates's interest is not an ERISA-qualified plan is no more than a necessary conclusion from its earlier finding that Dr. Yates cannot participate as an employee under ERISA. While the Plan may be ERISA-qualified as to other participants, the court found it is not ERISA-qualified as to Dr. Yates. Dr. Yates may have been participating in the Plan, but his participation in the Plan was not under ERISA. fn6

In summary, the Bankruptcy Court did not find the Plan as a whole was not ERISA-qualified, as the Plan and Dr. Yates in his capacity as trustee assert. The Bankruptcy Court found, because Dr. Yates could not participate in an ERISA-qualified plan, the Plan was not ERISA-qualified as to him. The issue of whether Dr. Yates is qualified to participate under ERISA is one of law, not of fact.

B. Whether Dr. Yates can participate in the Plan and benefit from the protections of ERISA

The Bankruptcy Court was correct in holding, (1) under the governing case law of the United States Court of Appeals for the Sixth Circuit, Dr. Yates was not qualified to participate in the Plan under ERISA, and (2) Dr. Yates was therefore ineligible to benefit from the protections of ERISA.

Crucial to an understanding of Appellants' assertion Dr. Yates could participate in the Plan under ERISA, and to the Bankruptcy Court's conclusion he could not, is an understanding of how ERISA defines certain terms. In fact, the issue the Plan and Dr. Yates in his capacity as trustee raise is essentially decided by definition. Appellants interpret ERISA to permit an employer to be an employee for certain purposes. The Bankruptcy Court held employers and employees are two inalterably distinct categories, for purposes of ERISA-qualified pension plans.

Title 29 U.S.C. § 1002 defines terms used in ERISA. It defines "employee pension benefit plan" as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment

or beyond,

29 U.S.C. § 1002(2)(A).

Section 1002(6) defines "employee" as "any individual employed by an employer." Section 1002(7) defines "participant" as "any employee or former employee of an employer. . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . ."

Title 29 of the Code of Federal Regulations § 25 10.3-3(b), an ERISA regulation, provides in part, ". . . the term 'employee benefit plan' shall not include any plan, fund or program,. . . under which no employees are participants covered under the plan. . . ." 29 C.F.R. § 2510.3-3(b).

Title 29 of the Code of Federal Regulations § 2510.3-3(c)(1), also referencing ERISA, provides, "An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse " 29 C.F.R. § 2510.3-3(c)(1).

The Bankruptcy Court held Dr. Yates was not qualified to participate in the Plan under ERISA. Pursuant to Sixth Circuit holdings in SEC v. Johnston, 143 F.3d 260 (6th Cir. 1998); Fugarino v. Hartford Life and Accident Insurance Co., 969 F.2d 178 (6th Cir. 1992); and Lowenschuss v. Selnick, 171 F.3d 673 (9th Cir. 1999), the court ruled an employer cannot be an employee or a participant under ERISA (Rec. 14, at 9). Finding these cases to hold self-employed sole owners of businesses are excluded from participating under ERISA in plans they sponsor, and noting Dr. Yates was a self-employed, sole owner sponsor of a pension plan, the court held Dr. Yates was likewise disqualified from participating as an employee in an ERISA-qualified plan (Rec. 14, at 10).

The Plan and Dr. Yates in his capacity as trustee attempt to distinguish this case from Johnston, Fugarino, and

Lowenschuss. In Johnston the Sixth Circuit stated: "ERISA does not apply to any plan to the extent it benefits the sole owner of a business and his or her spouse." 143 F.3d at 262 (quoting from the appellant Securities and Exchange Commission's challenge to the district court's holding). As Appellants observe, Johnston dealt with a plan that covered only the sole owner employer and his wife. Id. Thus, Johnston's plan was not created for the benefit of employees other than the sole owner. In contrast, Dr. Yates established a plan that at all times covered at least one other employee who was not a family member (Court File No. 2, at 10-12). While the Plan and Dr. Yates in his capacity as trustee are correct as to this distinction between Johnston's and Dr. Yates's plans, Johnston still applies to this case, for reasons to be discussed below.

In Fugarino the Sixth Circuit held "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." 969 F.2d at 186. The plaintiff in Fugarino was the sole proprietor of a restaurant, who purchased group health insurance coverage for himself, his dependants, and a few employees and their dependants. Id. at 181. The court held Fugarino had established and maintained an employee welfare benefit plan regulated by ERISA as to his employees and their dependants. However, as to Fugarino and his dependants, the Court concluded the group health insurance policy was not an ERISA plan and only constituted an insurance contract governed by State law. Fugarino could not qualify under ERISA as a participant in the plan because of the provision of 29 C.F.R. § 2510.3-3(c)(1) stipulating that a sole owner of a business shall not be deemed to be an employee with respect to the business. Id. at 185-86.

When discussing Fugarino, the Plan and Dr. Yates in his capacity as trustee contend Fugarino has been legislatively overruled by ERISA § 732(d)(3) [29 U.S.C. § 1191 a]; fn7 (2) Fugarino applies to sole proprietorships, not to solely owned corporations; (3) the Sixth Circuit erred Fugarino by failing to read the applicable regulation, 29 CFR § 251 0.3-3(c)(1) in its

totality (Court File No. 2, at 11- 13.) Johnston provides an immediate answer to the first two contentions.

As to Appellants' first contention, Johnston found the logic in Fugarino controlling, in spite of the fact that Johnston was decided in 1998, after the 1996 amendment at ERISA § 732(d)(3), which Appellants refer, and in spite of the fact Johnston pertained to a pension plan and Fugarino pertained to a health insurance plan. Johnston, 143 F.3d at 262. The Johnston court declared:

It is true that the plan at issue in Fugarino is a welfare plan, as opposed to the pension plan at issue in this case, but the Fugarino court referred generically to "a plan" in discussing ERISA qualification. 969 F.2d at 185. The Fugarino court also cited 29 C.F.R. § 25 10.3-3, which applies to both welfare and pension plans. Id. We hold that the principle enunciated in Fugarino applies to pension and welfare plans.

Id.

Section 732(d) is specifically directed toward coverage under group health plans. A change in ERISA's treatment of business owners in regard to participation in group health plans would not affect ERISA's treatment of business owners in regard to participation in pension plans. And, as already noted, Johnston was decided after the amendment. If the Johnston court had believed the amendment had implications for pension plans, it would have said so.

As to Appellants' second contention, that Fugarino applies to sole proprietorships and not to solely owned corporations, Johnston found Fugarino controlling, in spite of the fact Fugarino pertained to a sole proprietor, Fugarino, 969 F.2d at 180, while Johnston pertained to the sole owner of a corporation, Johnston, 143 F.3d at 261. The Sixth Circuit did not distinguish between a sole proprietor and the sole owner of a corporation for purposes of determining whether the sole owner of a business entity can participate as an employee under ERISA. See also Agrawal v. Paul Revere Life

Ins. Co., 205 F.3d 297 (6th Cir. 2000) (discussed infra, applying Fugarino to the sole owner of a corporation).

Appellants' third contention is the Fugarino court misread 29 C.F.R. § 2510.3-3(c)(1). Appellants argue a complete reading of the regulation would have led the court to realize § 25 10.3-3(c)(l) applies only to the question of whether an ERISA-qualified plan exists, and not at all to the question of whether an employer can participate in an ERISA-qualified plan as an employee. In other words, § 2510.3-3(c)(1) should be read to mean a plan that includes only an employer and his or her spouse cannot be an ERISA-qualified plan. Such a reading does not preclude the possibility that, once an ERISA-qualified plan exists (that is, one in which employees other than the employer are participating), then the employer may join as an additional employee (Rec. 2, at 13-15).

As to the contention the Sixth Circuit misread or misunderstood the import of 29 C.F.R. § 2510.3-3(c)(1), this Court, and all lower courts, are bound to apply the regulation in the same manner as the Sixth Circuit applied the regulation. See Beverly Enterprises v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984). Appellants cite to Madonia v. Blue Cross & Blue Shield of Virginia, 11 F.3d 444, 449 (4th Cir. 1995) and Vega v. Nat Life Ins. Services, Inc., 188 F.3d 287 (5th Cir. 1999) in support of the position that, while a sole owner cannot create an ERISA-qualified plan if he or she is to be the sole participant in the plan, the sole owner may create a plan for the benefit of other employees, and then personally participate in the plan as an employee (Rec. 2, at 17-21). While the reasoning contained in Madonia and Vega may be compelling, it is not the law in the Sixth Circuit.

Fugarino has particular application to the instant case, because Fugarino dealt specifically with a plan that was ERISA-qualified for Fugarino's employees, but not ERJSA-qualified for sole owner Fugarino. 969 F.2d at 185. Given that Johnston held Fugarino applied to sole owners of corporations and to pension plans, Johnston, 143 F.3d at 262, Fugarino's complete applicability to the instant case is clear.

fn8

The Bankruptcy Court further held, because Dr. Yates was not a qualified participant in the plan under ERISA, he was not eligible for the protections afforded by ERISA (Rec. 14, at 10). The Sixth Circuit's recent decision of Agrawal v. Paul Revere Life Insurance Co., 205 F.3d 297 (6th Cir. 2000), decided since the Bankruptcy Court's ruling, applies to, and supports the determination made by the Bankruptcy Court. Agrawal was the sole owner of a corporation that carried three disability policies. Id. at 298. One of the policies covered both Agrawal and other employees and was ERISA-qualified as to the other employees. At issue was a separate policy, of which Agrawal was the sole beneficiary. Id. at 298. The Court of Appeals ruled:

The district court erred in ignoring Fugarino. Because Dr. Agrawal is the sole shareholder of Agrawal, Inc., he is neither a participant nor a beneficiary under an ERISA plan. See id. [citing Fugarino at 186.] As neither a participant nor a beneficiary, Dr. Agrawal is not an ERISA entity; likewise, he does not have standing under the ERISA enforcement mechanisms. See Smith, 170 F.3d at 616-17 [citing Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999)]. Because Congress did not intend to create an enforcement mechanism to bind non-ERISA parties, we hold that Dr. Agrawal does not have standing to enforce his rights under ERISA.

Id. at 302.

The fact Dr. Yates was not qualified to participate in an ERISA protected plan means none of the money he contributed to the Plan as an "employee" was ever a part of an ERISA plan. The $50,467.46 he returned to the Plan was not protected by ERISA, because none of the money he had in the Plan was protected by ERISA. fn9

Reading ERISA independently, the Agrawal panel was not completely comfortable with Fugarino's conclusions. Id. at 302. Nonetheless, the panel was bound to apply Fugarino to

the case before it. See US. v. Dunlap, 209 F.3d 472, 480 (6th Cir. 2000). This Court is equally bound. See Beverly Enterprises, 727 F.2d at 593.

C. Whether Dr. Yates's loan repayments to the Plan are excluded from the bankruptcy estate under ERISA

The success of Appellants' argument that Dr. Yates's loan repayments are excluded from the bankruptcy estate is contingent upon acceptance of their earlier argument that Dr. Yates was a qualified participant in an ERISA-qualified plan. Both this Court and the Bankruptcy Court held Dr. Yates was not participating in a plan that was ERISA-qualified as to him. Because the Plan was not ERISA-qualified as to Dr. Yates, he could receive none of the protections of ERISA, Agrawal, 205 F.3d at 302, and his interest in the Plan was not excluded from the bankruptcy estate by virtue of its being part of an ERISA-qualified plan. The Bankruptcy Court did not resolve the question of whether the bankruptcy Trustee had the power to recover a preference from property that was excluded from the estate, because the Bankruptcy Court ruled the $50,467.46 was not excluded from the estate, either under ERISA or under State law (Rec. 14, at 12-14).

The Bankruptcy Court was correct in concluding, since Dr. Yates did not borrow from an ERISA-qualified plan, the loan repayments he made did not go into an ERISA-qualified plan. Were it not for Appellants' conflating their argument on this third issue (Rec. 2, at 22-23) with their reasoning in the previous issue (Rec. 2, at 8-21), the Court would devote no further attention to it. However, because Appellants appear to be using the Supreme Court's rulings in Patterson v. Shumate, 504 U.S. 753 (1992), and Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) to bolster their earlier argument that Dr. Yates was a qualified participant in an ERISA-qualified plan, the Court will review Appellants' argument more thoroughly.

Title 11 U.S.C. § 541(a) provides:

The commencement of a case under section 301, 302, or 303 of this title creates an estate Such estate is comprised of all the following property, wherever located and by whomever held

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case . . .

11 U.S.C. § 541(a)(l). In other words, with the few exceptions provided in subsections (b) and (c)(2) of the statute, all property of the debtor enters the bankruptcy estate.

Section 541(c)(2) provides the following exception to § 541(a)(l):

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C § 541(c)(2). In other words, a debtor's interest in a pension plan would be excluded from the bankruptcy estate if the plan contained a transfer restriction enforceable under nonbankruptcy law.

Had Appellants been able to establish Dr. Yates's interest in the Plan was ERISA-qualified, they might have shown the interest was excluded from the bankruptcy estate under "nonbankruptcy law," that is, under ERISA's antialienation provision. Fn10 Given the rulings of the Supreme Court in Shumate and Guidry, had Dr. Yates been eligible to participate in the Plan under ERISA, the Chapter 7 Trustee might have been prohibited from avoiding Dr. Yates's loan repayments to the Plan. However, because Dr. Yates was not a qualified participant, the ERISA restriction on alienation is inapplicable to him.

The Plan and Dr. Yates in his capacity as trustee rely on Shumate and Guidry to support their position a bankruptcy trustee cannot recover an otherwise avoidable preference

from an ERISA protected pension plan. The Shumate Court noted:

Section 541 (c)(2) provides the following exclusion from the otherwise broad definition of "property of the estate" contained in § 541 (a)(1) of the Code:

"A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non bankruptcy law is enforceable in a case under this title."

The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant non bankruptcy law.

Shumate, 504 U.S. at 757-58.

The Shumate Court went on to hold the ERISA-required antialienation provision in a pension plan constitutes an enforceable transfer restriction for purposes of 11 U.S.C. § 541(c)(2)'s exclusion of property from the bankruptcy estate. Id. At 760.

In Guidry, the Supreme Court prohibited a district court from imposing a constructive trust on an ERISA qualified pension plan for the purpose of assuring a union official would repay money he had embezzled from the union. 493 U.S. at 367, 372. The Court held a constructive trust violated the antialienation provisions of ERISA. Id. at 37 1-72. In finding the ERISA antialienation provisions protect ERISA-qualified plans from judgment collections, the Supreme Court concluded:

Nor do we think it appropriate to approve any generalized equitable exception–either for employee malfeasance or for criminal misconduct–to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless)

even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
Id. at 376.

The Plan and Dr. Yates in his capacity as trustee rely on Shumate to show § 541(c)(2)'s exclusion of certain property from a bankruptcy estate applies to ERISA protected pension plans. Shumate does indeed say this. But Shumate does not say anything about whether a sole shareholder in a business can participate in an ERISA-qualified plan. Under current Sixth Circuit law, as articulated in Agrawal, Johnston, and Fugarino, he cannot. Since Dr. Yates's contributions were not protected by ERISA, Shumate does not apply.

The Plan and Dr. Yates in his capacity as trustee rely on Guidry to show that any funds placed in an ERISA protected plan are protected from alienation, regardless of the nature of those funds prior to their addition to the plan. Guidry would support an argument preferential transfers are safe from avoidance once they enter an ERISA plan. But Guidry does not say what constitutes an ERISA plan. Based upon Sixth Circuit precedent found in Agrawal, Johnston, and Fugarino, Dr. Yates was not participating in a plan under any ERISA protections. Guidry is inapplicable to this case.

In their Reply Brief Appellants also rely on Loomer v. Becton, Dickinson and Co., 198 B.R. 755 (Bankr. D. Neb. 1996) (Court File No. 7, at 10). In that case a bankruptcy court held a bankruptcy trustee cannot recover loan repayments that are preferential transfers from a qualified ERISA plan. id. at 758. However, Loomer, a bankruptcy court level decision from another circuit, deals with a debtor whose qualifications to participate in an ERISA protected plan were undisputed: "The Trustee does not assert that the debtor's Contributions and Loan Repayments were not permitted under the Plan. Thus, once the Contributions were deposited into the Trust Fund, they gained the protection of the alienation restraint." Id. at 762. Dr. Yates's interest in the Plan was of an entirely different nature: it was not part of an ERISA qualified plan.

Loomer is inapplicable to this case.

In short, although Appellants have made a good argument that once otherwise avoidable loan repayments enter an ERISA qualified plan, they become untouchable by bankruptcy avoidance procedures, Appellants have failed to establish the Bankruptcy Court erred in concluding Dr. Yates's interest in the Plan was not protected by ERISA. Since Dr. Yates was not participating in an ERISA-qualified plan, he could not be protected by ERISA's antialienation provision.

D. Whether Dr. Yates's repayments to the Plan are excluded from the bankruptcy estate under Tennessee Code Annotated § 26-2-104(b)

The Bankruptcy Court correctly held the restriction on alienation provision of the Plan cannot be enforced under Tenn. Code Ann. § 26-2-104(b). Consequently, the Tennessee exemption statute cannot be applied to exclude Dr. Yates's interest in the Plan from the bankruptcy estate under 11 U.S.C. § 541(c)(2). fn11

As the Court previously noted, 11 U.S.C. § 54 1(a) provides a bankruptcy estate includes all legal or equitable interest of the debtor in property as of the commencement of the bankruptcy estate. Section 541(c)(2) provides for the exception of"[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." Tenn. Code Ann. §26-1-104(b), the Tennessee statute which exempts from creditor claims certain pension plan finds, provides:

[A]ny finds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§401(a), 401(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.

Tenn. Code Ann. § 26-2-104(b).

In their final argument, the Plan and Dr. Yates in his capacity as trustee urged the Bankruptcy

Court to rule Tennessee law precluded the Chapter 7 Trustee from recovering the $50,467.46 preference. They argued the Tennessee exemption statute constituted "[a] restriction on the transfer of a beneficial interest of the debtor in a trust" under 11 U.S.C. § 541(c)(2). Instead, the Bankruptcy Court found neither the repayments nor the rest of Dr. Yates's interest in the Plan was excluded from the bankruptcy estate (Rec. 14, at 12-14). In reaching this conclusion, the Bankruptcy Court relied heavily on the United States Court of Appeals for the Ninth Circuit's decision in Lowenschuss, 171 F.3d at 673.

The Ninth Circuit in Lowenschuss ruled a debtor could not use a Pennsylvania exemption statute to exclude his interest in a pension plan from the bankruptcy estate under 11 U.S.C. §541(c)(2) and Shumate. According to the Lowenschuss court, for an exemption statute to have the effect of excluding a debtor's interest in a pension plan from a bankruptcy estate, the statute must contain a provision which enforces the transfer restriction contained in the plan. Id at 681. The Lowenschuss court examined the Pennsylvania statute on which the pension plan trustee hoped to rely, and concluded the statute lacked the requisite enforcement provision. While ERISA enforces transfer restrictions by providing civil remedies to participants, the Pennsylvania statute contained no means for a debtor to enforce a pension plan's transfer restrictions. Id. at 682.

In Patterson [Shumate], the Supreme Court held that the transfer restriction required in every ERISA plan was enforceable because ERISA-plan participants or beneficiaries could enforce that transfer restriction through ERISA's civil remedies. . . . in contrast, § 8 124(b) [of the Pennsylvania Consolidated Statutes]does not provide a mechanism by which Debtor can enforce the transfer restriction contained

in the Pension Plan. In fact, the § 8124(b) exemption operates without regard to a transfer restriction that may be contained in the trust instrument. Therefore, Debtor's interest in the Pension Plan cannot be excluded from the bankruptcy estate under § 8124(b).

Id. at 682.

The Plan and Dr. Yates in his capacity as trustee rely on In re Yuhas, 104 F.3d 612 (3d Cir. 1997) and In re Meehan, 102 F.3d 1209 (11th Cir. 1997) to support their position the Tennessee exemption statute enforces the antialienation provision of the Plan. The Third Circuit in Yuhas concluded a New Jersey statute constituted a nonbankruptcy law containing an enforceable transfer restriction. 104 F.3d at 613. That statute read:

Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distribution plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from the estate in bankruptcy.

For purposes of this section, a "qualifying trust" means a trust created or qualified and maintained pursuant to federal law, including, but not limited to, section. . . 408 of the federal Internal Revenue Code of 1986 (26 U.S.C. § . . .408...).

N.J Stat. Ann. § 25:2-1(b).

The United States Court of Appeals for the Eleventh Circuit in Meehan likewise concluded the relevant State law contained an enforcement provision. 102 F.3d at 1210. That Georgia statute read:

Funds or benefits from an individual retirement account as defined in § 408 of the United States Internal Revenue Code of 1983, as amended, [are] exempt from the process of garnishment until paid or otherwise transferred to a member

of such program or beneficiary thereof

Ga. Code Ann. § 18-4-22(a).

The Pennsylvania statute which the Ninth Circuit in Lowenschuss read to contain no enforcement provision provided for the exemption "from attachment or execution on any judgment .[a]ny retirement or annuity fund provided for under section 40 1(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code. . . , the appreciation thereon, the income therefrom and the benefits or annuity payable thereunder." 42 Pa. Cons. Stat. § 8124(b)(1)(ix). 171 F.3d at 682. fn12

The Third, Ninth, and Eleventh Circuits came to different conclusions regarding the enforceability of State statutes not because the statutes were so different, but because the Courts of Appeals differed in how they dealt with the question of what constitutes an enforceable restriction. The Eleventh Circuit in Meehan focused on whether the restriction had to be contained in the plan, as opposed to being located in the statute, and concluded location in the plan itself was not required. 102 F.2d at 1212. The Third Circuit in Yuhas focused on what constitutes a "restriction," and concluded the New Jersey statute contains a restriction for purposes of 11 U.S.C. § 541(c)(2). 104 F.3 d at 614-15. Only the Ninth Circuit in Lowenschuss focused on what makes a restriction "enforceable" for purposes of 11 U.S.C. § 54l(c)(2). 171 F.3d at 682-84. fn13

The reasoning in Lowenschuss is persuasive. Because Tenn. Code Ann. § 26-2-104(b) does not provide debtors with a mechanism for enforcing a transfer restriction in qualifying pension plans, .t is not "enforceable," in the same sense that ERISA is enforceable. The Shumate Court noted ERISA's enforcement provisions included: plan trustees or fiduciaries are required under ERISA to discharge their duties in accordance with the governing plan; and participants, beneficiaries, fiduciaries, and the Secretary of Labor may all file civil actions to enjoin any acts which violate ERISA or the

terms of plan. 540 U.S. at 760. The Tennessee exemption statute contains no comparable enforcement provisions. fn14 Nor does it acquire enforcement provisions by virtue of its incorporation of 26 U.S.C. § 401.

Title 26 U.S.C. § 401, setting out the requirements for qualified pension, profit-sharing, and stock bonus plans, provides in relevant part:

(a) Requirements for qualification.–

(13) Assignment and alienation.–

(A) In general.–A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

26 U.S.C. § 401(a)(13)(A).

In its pre-Shumate decision In re Leamon, the Bankruptcy Court ruled:

Accordingly, 401(a)(13) constitutes 'applicable nonbankruptcy law' under which restrictions on the transfer of the debtor's interest may be enforced. Under the clear and unambiguous language of § 541(c)(2), if the antialienation provisions mandated by IRC § 401(a)(13) are enforceable against general creditors, they are enforceable against the [bankruptcy] trustee.

Leamon, 121 B.R. 974, 982 (Bankr. E.D. Tenn. 1990) (citing In re Moore, 907 F.2d 1476, 1480 (4th Cir. 1990)).

Since Shumate, courts dealing with this question have more often concluded that § 401(a) of the Internal Revenue Code does not create any substantive rights a beneficiary or trustee may enforce. See Securities and Exchange Commission v. Johnston, 922 F. Supp. 1220, 1225 (E.D. Mich. 1996); In re Wilcox, 225 B.R. 151, 158 (Bankr. E.D. Mich. 1998); In re

Dunn, 215 B.R. 121, 126-28 (Bankr. E.D. Mich. 1997) (relying on Reklau v. Merchants Nat'l Corp., 808 F.2d 628 (7th Cir. 1986); Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 890 (1st Cir. 1978); and Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir. 1975), cert. denied, 423 U.S. 1034 (1975)); In re Witwer, 148 B.R. 930, 937 (Banks. C.D. Cal. 1992). This latter position is the better. While ERISA contains the substantive enforcement provisions noted and approved in Shumate, 504 U.S. at 760, § 40 1(a) contains nothing comparable.

Since neither Tenn. Code Ann. § 26-2-104(b) nor Internal Revenue Code § 401(a) contain enforcement provisions for purposes of 11 U.S.C. § 541(c)(2), the Tennessee statute does not prevent Dr. Yates's interest in the Plan, including his repayments to the Plan, from becoming part of the bankruptcy estate.

IV. CONCLUSiON

The Court AFFIRMS the findings of the Bankruptcy Court as to the following: Dr. Yates cannot participate in the Profit Sharing Plan under ERISA, and is ineligible to benefit from the protections of ERISA; Dr. Yates's interest in the Plan is not protected by the restriction on alienation contained in Tenn. Code Ann. § 26-2-104(b); the Chapter 7 Trustee may recover, pursuant to 11 U.S.C. § 550, avoidable transfers made by Dr. Yates to the Plan, to include the $50,467.46 loan repayment. The Court AFFIRMS the Bankruptcy Court's grant of summary judgment in favor of Plaintiff-Appellee, and denies Defendants-Appellants' petition for reversal.

An Order will enter.

CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 This agreement provided for the revision and continuance of a substantially similar plan of the same name made effective in June of 1974.

fn2 The Plan and Dr. Yates in his capacity as trustee appear to have received the letter, which was addressed to Plan sponsor General Trust Company, from the trust company, and not from the IRS. The letter references the "Prototype Standardized Profit Sharing Plan with CODA."

fn3 Section 14 of the Adoption Agreement permitted the Plan to establish a participant loan program. The particular loan program adopted by the Plan was entitled "Model Loan Program," and was attached to the Adoption Agreement as an exhibit.

fn4 Dr. Yates originally borrowed from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan. The loan transferred to the Profit Sharing Plan in 1992, when the Money Purchase Pension Plan merged into the Profit Sharing Plan (Rec. 13).

fn5 Title 11 U.S.C. § 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made-
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

fn6 The Bankruptcy Court's statement that Dr. Yates's interest in the Plan was not ERISA-qualified came in the context of the court's response to Defendants-Appellants' argument the Bankruptcy Trustee had no power to recover Dr. Yates's loan repayments to the Plan. Defendants-Appellants argued the repayments were excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The court, on the other hand, concluded the transferred funds were part of the bankruptcy estate, on the grounds 11 U.S.C. § 541(c)(2) had no application. The $50,467.46 flowed into Dr. Yates's portion of the Plan, and that portion was neither a spendthrift hind nor ERISA-qualified. The question of whether the $50,467.46 was, or was not, part of the bankruptcy estate lies at the heart of this case, and will be considered in detail, in connection with the remaining issues the Plan and Dr. Yates in his capacity as trustee have raised.

fn7 This section provides in part:
§ 732. Special rules relating to group health plans.

(d) treatment of partnerships. For purposes of this part–

(3) Participants of group health plans. In the case of a group health plan, the term "participant" also includes–

(B) in connection with a group health plan maintained by a self-employed individual (under which one or more employees are participants), the self-employed individual, if such individual is, or may become, eligible to receive a benefit under the plan or such individual's beneficiaries may

be eligible to receive any such benefit.

fn8 Because of the compelling applicability of Fugarino to the case before the Court, the applicability of Lowenschuss, the third case upon which the Bankruptcy Court relied need not be discussed at this point. Lowenschuss has greater application to Appellant's fourth issue, concerning the protections that may be available under State law.

fn9 As will be discussed in greater detail, in some cases, a debtor could argue, because the debtor's interest in a pension plan is ERISA protected, money repaid to the plan is likewise protected by ERISA, even if the repayment was otherwise subject to avoidance. Dr. Yates is not in a position to make this argument, because his interest in the Plan has never been protected.

fn10 29 U.S.C. § 1056(d)(1) provides:

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

fn11 As noted earlier, Dr. Yates claimed his entire interest in the Plan was exempt under Tenn. Code Ann. § 26-2-104(b). However, the Bankruptcy Court found the $50,467.46 repayment to the Plan was a preferential transfer, avoidable under Bankruptcy Code § 547(b) (Rec. 14, at 8-9). Thus, the approximately $36,000 to $38,000 interest in the Plan Dr. Yates had not borrowed was exempt under Tenn. Code Ann. § 26-2-104(b), but the $50,467.46 he had borrowed and repaid was not exempt. When Defendants-Appellants argued the Bankruptcy Trustee could not recover a preference from the Plan because Dr. Yates's interest in the Plan was exempt property under Tenn. Code Ann. § 26-2-104(b), the Bankruptcy Court properly ruled only a debtor can assert the exemption statute as a defense to a preference action (Rec. 14, at 12). Defendants-Appellants did not appeal the Bankruptcy Court's ruling on this issue. Defendants-Appellants' final argument on appeal relates not to whether the repayments could be exempted from the estate, but to

whether the repayments should have been excluded from the estate. The distinction between these two arguments may have caused Plaintiff-Appellee some confusion (Court File No. 4, at 15), to which Defendants-Appellants aptly responded (Court File No. 7, at 12). M exemption is personal to the debtor, and property claimed under an exemption is property of the bankruptcy estate which the debtor is permitted to exempt out of the estate. In re Everhart, 11 B .R. 770, 774 (Banks. N.D. Ohio 1981). In contrast, property excluded under 11 U.S.C. § 541(c)(2) was never part of the bankruptcy estate.

fn12 However, the statute did not allow exemption of contributions made within one year of the petition date, contributions in excess of$ 15,000 made within a one-year period, and fraudulent conveyances.

fn13 Lowenschuss created a split among the circuits as to whether the transfer restriction to which 11 U.S.C. §541 (c)(2) applies must be contained within the trust instrument. The Yuhas and Meehan courts had ruled the restriction need not be explicit in the trust instrument itself. Lowenschuss ruled the restriction must be contained in the pension plan itself. Lowenschuss, 171 F.3d at 683. The Court need not confront the conflict directly in this case. Both the pension plan in Lowenschuss and the Plan in the case before this Court contained transfer restrictions. At issue here is whether the State law enforced that restriction. However, the Court notes a bankruptcy court in the Western District of Pennsylvania followed Yuhas, and concluded 42 Pa. Cons. Stat. § 81 24(b)(1)(ix) does constitute a transfer restriction within the meaning of 11 U.S.C. § 541(c)(2). In re Fulton, 240 BR. 854, 861 (W.D. Penn. 1999).

fn14 The Plan and Dr. Yates in his capacity as trustee did not appeal the Bankruptcy Court's finding the Plan did not constitute a spendthrift trust under TCA 26-4-101 (Rec. 14, at 11).

No. 3:99-CV-600
Judge Curtis L. Collier

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, Trustee,
Defendants-Appellants.

Filed June 26, 2000

ORDER

In accordance with the accompanying Memorandum, the Court hereby AFFIRMS the decision of the Bankruptcy Court.

SO ORDERED.

ENTER:

CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Case No. 96-34511
Adv. Proc. No. 98-3088

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, and/or
QUICK & REILLY, Plan Adminstrator/Plan Trustee,
Defendants.

MEMORANDUM ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

APPEARANCES:
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Profit Sharing Plan, Raymond B. Yates, Plan Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Chapter 7 Trustee, William T. Hendon, filed a Complaint on August 5, 1998, against Quick & Reilly, Inc., the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the Defendant Plan) and the Defendant Plan's trustee, Raymond B. Yates. The Trustee alleges that the Defendant Plan received from the Debtor, Raymond B. Yates, two transfers which constitute avoidable preferences under 11 U.S.C.A. § 547(b) (West 1993) and seeks to recover those transfers pursuant to 11 U.S.C.A. § 550 (West 1993 & Supp. 1999). fn1

This matter is before the court on cross motions for summary judgment. The Trustee filed a Motion for Summary Judgment on March 31, 1999, accompanied by a Plaintiff's Memorandum in Support of Motion for Summary Judgment. On the same date, the Defendants filed a Motion for Summary Judgment of Defendants Raymond B. Yates, M.D., P.C. Profit Sharing Plan and Raymond B. Yates, Trustee, accompanied by a Brief in Support of Motion for Summary Judgment. A Plaintiff's Response to Motion for Summary Judgment Filed by Defendant Plan and a Defendants' Response to Plaintiffs Motion for Summary Judgment were filed on April 20, 1999, and a Defendants' Reply to Plaintiffs Response to Defendant's Motion for Summary Judgment was filed on April 28, 1999.

The record before the court includes the following: the March 31, 1999 Affidavit of Raymond B. Yates; the February 19, 1997 Deposition of Raymond B. Yates, M.D.; the November 13, 1996 Deposition of Raymond B. Yates; the March 31 1999 Affidavit of C. Mark Troutman; the March 31, 1999 Affidavit of William T. Hendon; the Stipulation of Facts filed by the parties on June 28, 1999; the Statement of Financial Affairs, Schedules, Individual Debtor's Statement of Intention filed in the Debtor's case on April 15, 1997; the March 7, 1997 Settlement Statement relating to the sale of the Debtor's former home; the May 10, 1990 letter from the Chief of the Employee Plans Qualifications Branch of the Internal Revenue Service; the Qualified Plans Prototype Defined Contribution Plan and Trust Adoption Agreement #001 (Adoption Agreement) executed on July 20, 1990; the First Amendment to the Qualified Plans Prototype Defined

Contribution Plan and Trust Basic Document #01; a Promissory Note executed by the Debtor on December 13, 1989; an Irrevocable Pledge and Assignment executed by the Debtor on December 13, 1989; the Debtor's Participant Loan Application; and annual Trust Financial Reports for each of three years beginning July 1, 1992, and ending June 30, 1995, as well as Year-end Plan Valuations for the Raymond B. Yates, M.D., P.C. Profit Sharing Plan for each of three years beginning July 1, 1989, and ending June 30, 1992.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

I

An involuntary petition was filed against the Debtor on December 2, 1996. An Order for. Relief was entered under Chapter 7 on February 27, 1997, and William T. Hendon was appointed trustee.

Raymond B. Yates, M.D., P.C., a professional corporation, is wholly owned by the Debtor. OnJuly2O, 1990, Raymond B. Yates, M.D., P.C. created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan, the Defendant Plan in this adversary proceeding, by executing an Adoption Agreement. fn2 The Debtor signed the Adoption Agreement in his capacity as president of the named employer, Raymond B. Yates, M.D., P.C., and as trustee of the Defendant Plan. The Defendant Plan was modified by the First Amendment to the Qualified Plans Prototype Defined Contribution Plan and Trust Basic Document #01. By letter dated May 10, 1990, the Internal Revenue Service informed the Defendants that the Defendant Plan was "acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of employees."

The Debtor has been participating in the Defendant Plan as an employee. In that capacity, he was permitted to borrow against his interest in the Defendant Plan under the Model

Loan Program which was incorporated into the Defendant Plan by the Adoption Agreement. On December 13, 1989, the Debtor executed a Promissory Note in the principal amount of $20,000.00. The terms of the loan provided for an eleven percent rate of interest until default and a five-year repayment period, which was extended for another five years on June 12, 1992.

In addition, on December 13, 1989, the Debtor executed an Irrevocable Pledge and Assignment to secure the indebtedness to be repaid under the Promissory Note. In the Irrevocable Pledge and Assignment, the Debtor pledged and assigned to the trustee of the Defendant Plan "the Vested Employer Account Balance, at any time existing under the Plan, necessary to satisfy the loan which is the subject of this pledge, any unpaid interest on such loan, all attorneys' fees necessary for collection of this obligation and all costs of collection."

The Debtor failed to make regular payments on the Promissory Note and it remained outstanding until November 1996, when the Debtor made two payments to the Defendant Plan. On November 12, 1996, he paid $38,000.00 and on November 13, 1996, he paid $12,467.46. Together, the payments totaled $50,467.46 and represented the amount of principal and interest due under the Promissory Note. The Debtor used the proceeds from the sale of his home to make those payments. fn3

The record contains no financial reports for the Defendant Plan after June 30, 1995, however, the Debtor stated that his interest in the Defendant Plan was approximately $36,000.00 just prior to the $50,467.46 loan repayment, and approximately $87,000.00 after the repayment. In addition, the Debtor valued his interest in the Profit Sharing Plan at $89,000.00 in the schedules that he filed in his bankruptcy case. fn4

Article 18.02 of the Basic Document #01 is a "Spendthrift Clause" which provides as follows:

Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in Section 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

II

The parties ask the court to resolve three issues:

1. Whether the repayment, within ninety days prior to the commencement of the Debtor's case, of $50,467.46 by the Debtor to the Defendant Plan is a preferential transfer, and therefore avoidable under Bankruptcy Code § 547(b)?

2. Whether the return of the funds paid by the Debtor to the Defendant Plan would be in direct violation of the disbursement provisions of the plan?

3. Whether the funds paid by the Debtor to the Defendant Plan represent a portion of the Debtor's interest in a qualified retirement plan and, as such, are excluded from his bankruptcy estate?

III

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is available only when a party is entitled to a judgment as a matter of law and when no genuine issues of material fact exist. See Hall v. Tollett, 128 F.3d 418, 421-22 (6th Cir. 1997). The substantive law of the underlying action will dictate which facts are material for the purposes of

summary judgment. See Gibson v. Gibson (In re Gibson), 219 B.R. 195, 199 (B.A.P. 6th Cir. 1998) (citing Hanover Ins. Co. v. American Eng 'g Co., 33 F.3d 727, 730 (6th Cir. 1994)).

In this matter, the substantive law concerned is § 547(b) of the Bankruptcy Code which ailows the trustee to avoid certain transfers of "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." Begier v. Internal Revenue Serv., 110 S. Ct. 2258, 2263 (1990). The law of preferential transfers is implicated in this matter because, had the Debtor not transferred the $50,467.46 in proceeds from the sale of his home to the Defendants, that property would have become property of the estate under 11 U.S.C.A. § 541 (West 1993 & Supp. 1999) fn5

Subsection 547(b) provides as follows:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent; (4) made-
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C.A. § 547(b).

The parties do not dispute that the Defendant Plan was a creditor of the Debtor or that the transfer was made on account of an antecedent debt, therefore § 547(b)(1) and § 547(b) (2) are established. The Defendants have not rebutted the presumption set by § 547(f) that the Debtor was insolvent on and during the ninety days immediately preceding the date of the filing of the petition, thus § 547(b)(3) is established. See 11 U.S.C.A. § 547(f) (West 1993). Also, the Defendants admit that the transfers were made in November, within ninety days of the filing of the Debtor's petition, satisfying § 547(b)(4).

Finally, regarding § 547(b)(5), courts may presume that when a debtor transfers property to an undersecured creditor, the creditor will first apply the transfer to the unsecured portion of the debt. See Hunter v. Snap-On Credit Corp. (In re Fox), 229 B.R. 160, 165 n.2 (Bankr. N.D. Ohio 1999) (citing Belfance v. Banchio/National Bank (In re McCormick), 5 B.R. 726, 729-30 (Bankr. N.D. Ohio 1980) (holding that the presumption comports with standard business practices)). Thus, § 547(b)(5) may be satisfied if the debtor transferred property to an undersecured creditor. See Bruinsma v. Citizens Banking Corp. (In re Fleming), 226 B.R. 3, 7 (Bankr. W.D. Mich. 1998). There is no dispute that the debt owing to the Defendant Plan was undersecured or that the Debtor's unsecured creditors will receive less than one hundred percent of their claims. See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 465 (6th Cir. 1991) ("Unless the estate is sufficient to provide a 100% distribution, any unsecured creditor. . . who receives a payment during the preference period is in a position to receive more than it would receive under a Chapter 7 Liquidation."). Thus, the transfers to the Defendant Plan enabled it to receive more than it would have if the transfers had not been made and it received a distribution under the Bankruptcy Code. All of the elements of a preference are satisfied.

IV

The Defendants argue that the Trustee cannot recover the preferences from the Defendant Plan because there is a restriction on the transfer of the Debtor's interest in the Defendant Plan that is enforceable under the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C.A. §§ 1001, et seq. (West 1998) ("ERISA")).

ERISA was designed to protect employees from the improper administration of their pension plans by their employers. See Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673, 680 (9th Cir. 1999), petition for cert. filed (U.S. July 27, 1999) (No. 99-187). Employees and employers are therefore considered separated entities under ERISA. See Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178, 186(6th Or. 1992), cert. denied, 113 5. Ct. 1401 (1993). That point is explained in the Code of Federal Regulations:

> An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse.

29 C.F.R. § 2510.3-3(c)(1) (1998). Accordingly, an employer cannot be an employee or a participant under ERISA and is not eligible to benefit from its protections. See Securities and Exchange Comm. v. Johnston, 143 F.3d 260, 262 (6th Cir. 1998) (citing Fugarino, 969 F.2d at 185-86); Lowenschuss, 171 F.3d at 680. Self-employed owners of businesses that sponsor pension plans "were deliberately excluded from ERISA's protections because these individuals can protect their own beneficial interests in the plans." Lowenschuss, 171 F.3d at 680.

The Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the

transfer of his beneficial interest in the Defendant Plan.

V

The Defendants also argue that the Plan's transfer restrictions and disbursement provisions are enforceable against the Trustee under the terms of the Plan, but provide no authority to support that argument. Tennessee does allow spendthrift trusts pursuant to TENN. CODE ANN. § 26-4-101 (1980 & Supp. 1998), which outlines express spendthrift trust requirements. To supplement those statutory requirements, courts require "that the trust must be an "active" rather than a "dry" trust, which basically means that the property must be under the control of the trustee rather than the debtor-beneficiary.'" In re Faulkner, 79 B.R. 362, 366 (Bankr. E.D. Tenn. 1987) (citation omitted) (quoting In re Elsea, 47 B.R. 142, 148-49 (Bankr. E.D. Tenn. 1985)) (overruled by Patterson v. Shumate, 112 S. Ct. 2242 (1992) only to the extent that Faulkner limited the application of 11 U.S.C. § 541(c)(2) to pension plans exclusively to spendthrift trust law). Under Tennessee law, a pension plan is not a spendthrift trust if the plan permits a participant to borrow from his interest in the plan and use his vested interest in the plan as security. See id. This court has previously explained,

> The clear impact of [the loan provision] is to provide the debtor-participant ready access at any time to his vested interest in the Plan. One can easily envision a situation arising at the time a Plan participant becomes entitled to benefits under the Plan where those benefits have been fully encroached upon through loans . . . . The anti-alienation provisions and anti-assignment provisions . . . of the Plan have thus been avoided and rendered meaningless.
>
> Id.

Under the Defendant Plan, a participant may borrow against his interest in the Defendant Plan. In addition, under the Defendant Plan, the "only security acceptable to secure a loan is one-half of the vested account balance of an

employee." Model Loan Program at 3. As explained in Faulkner, the anti-alienation provisions of the Defendant Plan may be avoided and are meaningless. Accordingly, the Defendant Plan is not a spendthrift trust under Tennessee law and its anti-alienation provision is not enforceable against the Trustee.

VI

The Defendants also argue that the Trustee may not recover a preference from the Defendant Plan because the Debtor's interest in the Defendant Plan is exempt property. They argue that TENN. CODE Area. § 26-2-104(b) (Supp. 1998) prevents the Trustee from disgorging the Debtor's interest in the Plan. That subsection provides in material part:

> [A]ny funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.
>
> TENN. CODE ANN. § 26-2-104(b).

Although the Debtor's interest in the Defendant Plan may be exempt property, the Defendants cannot assert the exemption statute as a defense to this preference action. See Joelson v. Tiffin Say. Bank (In re Everhart), 11 B.R. 770, 772 (Bankr. N.D. Ohio 1981) (deciding that a defendant cannot assert a debtor's exemption as a defense in a preference action). Only a debtor may claim an exemption. See 11 U.S.C.A. § 522(b) (West 1993 & Supp. 1999); Taunt v. General Retirement Sys. (In re Wilcox), 225 B.R. 151, 155 (Bankr. E.D. Mich. 1998) ("It is well established that assertion of an exemption under bankruptcy law is personal to the debtor."); Everhart, 11 B.R. at 772. Even if the Defendants could raise the exemption as a defense, it would be of little consequence because exempt property is property of the estate; thus,

exempt property "must first go into the estate and from there only may [it] be exempted out." Everhart, 11 B.R. at 774.

VII

Finally, the Defendants argue that the Trustee has no power to recover a preference from property that would be excluded from the estate. The court need not resolve that issue because the Debtor's interest in the Defendant Plan is not excluded from property of the estate by 11 U.S.C.A. § 541(c)(2) (West 1993). Bankruptcy Code § 541 provides, with some exceptions, that the commencement of a case creates an estate comprised of all legal and equitable interests of a debtor in property as of that date. See 11 U.S.C.A. § 541(a)(1) (West 1993). One exception is set forth in § 541 (c)(2), which provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Id. at (c)(2). Although a debtor's interest in a pension plan may be excluded from property of the estate under § 541(c)(2) if it is held in a spendthrift trust or in an ERISA-qualified plan, see Patterson v. Shumate, 112 S. Ct. 2242, 2246-47 (1992), that point is irrelevant in the present matter because the Debtor's interest is not in a spendthrift trust or ERISA-qualified plan.

Further, the Tennessee exemption statute cannot be construed as enforcing "[a] restriction on the transfer of a beneficial interest of the debtor in a trust" under § 541(c)(2). In Lowenschuss, the Ninth Circuit confronted that argument with regard to a Pennsylvania exemption statute. See Lowenschuss, 171 F.3d 673, 682 (9th Cir. 1999). It decided that a debtor could not use the exemption statute to exclude his interest in a pension plan from the estate under § 541(c)(2) and Patterson. The court based that decision on the fact that the statute lacked enforcement provisions of the type cited by the Supreme Court in Patterson. See Id. In Patterson, the Supreme Court concluded that ERISA enforced a pension plan's transfer restrictions by providing civil remedies to participants. See id. (citing Patterson, 112 5.

Ct. at 2247). The Pennsylvania exemption statute did not provide civil remedies or other enforcement mechanisms. See Id. The Ninth Circuit also explained that the Pennsylvania exemption "operates without regard to a transfer restriction that may be contained in the trust instrument." Id. fn6

Like the Pennsylvania exemption, TENN. CODE ANN. § 26-2-104(b) does not provide debtors with a mechanism for enforcing a transfer restriction in qualifying pension plans and it operates without regard to the particular transfer restriction that may be contained in the pension plan. Thus, § 26-2-104(b) does not enforce the restriction on the transfer of the Debtor's interest in the Defendant Plan. The Debtor's interest in the plan is not excluded from property of the estate under § 541(c)(2) and the court need not reach the argument that property excluded from the estate is beyond the reach of a trustee's power to avoid and recover preferential transfers.

VIII

There are no genuine issues of material fact in dispute in this adversary proceeding and summary judgment is appropriate. The Trustee has met his burden of proving the elements of a preferential transfer. The Defendants' arguments against the ability of the Trustee to recover the transfers are without merit. Accordingly, the Trustee may avoid the November 12 and 13, 1996 transfers from the Debtor to the Defendant Plan and may recover those transfers from the Defendant Plan. fn7 The Trustee's Motion for Summary Judgment will be granted and the Defendants' Motion for Summary Judgment will be denied. A judgment will be entered consistent with this Memorandum.

FILED: September 2, 1999

BY THE COURT

RICHARD STAIR, JR
UNITED STATES BANKRUPTCY JUDGE

Footnotes

fn1 The action was dismissed as to Defendant Quick & Reilly, Inc. by an Agreed Order entered October 19, 1998.

fn2 The Adoption Agreement provides that the Defendant Plan "amends, restates, and continues [a prior plan] which was originally effective on June 15, 1974."

fn3 Although the Settlement Statement for the sale of the home is dated March 7, 1997, the Trustee stated in his March 31, 1999 Affidavit that the sale actually closed in October 1996. That fact is undisputed.

fn4 On Schedule C, the Debtor claimed that his interest in the Defendant Plan, $89,000.00, was exempt under TENN. CODE ANN. § 26-2-104(b) (Supp. 1998).

fn5 11 U.S.C.A. § 541(a) provides, in material part, that the commencement of a case in bankruptcy creates an estate which includes, with some exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case."

fn6 The Lowenschuss decision created a circuit split, setting the Ninth Circuit against the Third and Eleventh Circuits, on "the issue of whether the 'restriction' to which 11 U.S.C. § 541(c)(2) refers must be contained within the trust instrument." Lowenschuss, 171 F.3d at 683. Because the pension plan in the present matter did contain a trust instrument, that question is not at issue here.

fn7 Once a transfer is avoided under § 547, the Trustee is entitled to recover the property transferred from "the initial transferee of such transfer or the entity for whose benefit the transfer was made." 11 U.S.C.A. § 550(a)(1) (West 1993).

Case No. 96-34511
Adv. Proc. No. 98-3088

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, and/or
QUICK & REILLY, Plan Adminstrator/Plan Trustee,
Defendants.

JUDGMENT

For the reasons stated in the Memorandum on Cross Motions for Summary Judgment filed this date, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Motion for Summary Judgment of Defendants Raymond B. Yates, M.D., P.C. Profit Sharing Plan and Raymond B. Yates, Trustee, filed by the Defendants Raymond B. Yates, M.D., P.C. and Raymond B. Yates, Trustee, on March 31, 1999, is DENIED.

2. The Motion for Summary Judgment filed by the Plaintiff William T. Hendon, Trustee, on March 31, 1999, is GRANTED.

3. The transfers from the Debtor, Raymond B. Yates, to the Defendant Raymond B. Yates, M.D., P.C. Profit Sharing Plan on November 12 and 13, 1996, in the amounts of $38,000.00 and $12,467.46, respectively, are avoided pursuant

to 11 U.S.C.A. § 547(b) (West 1993).

4. The Plaintiff shall recover from the Defendant Raymond B. Yates, M.D., P.C. Profit Sharing Plan, for the benefit of the estate, the amount of the avoided transfer, $50,467.46, pursuant to 11 U.S.C.A. § 550(a)(1) (West 1993).

ENTER: September 2, 1999

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Notice sent to:

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Knoxville, TN 37901

Al Holifield
P.O. Box 442
Knoxville, TN 37901

William T. Hendon
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Knoxville, TN 37933-1228

United States Trustee
800 Market Street, Suite 114
Howard H. Baker, Jr. US Courthouse
Knoxville, TN 37902

00-6023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, TRUSTEE.
Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN, ET AL.,
Appellants.

Filed June 20, 2002

ORDER

BEFORE: NELSON, CLAY, and GARWOOD,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judge** having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Footnotes

*Hon. Will L. Garwood, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sifting by designation.

**As a Senior Judge, Judge Nelson was not eligible to vote on the petition for rehearing. Had he been able to do so, Judge Nelson would have voted in favor of granting the petition.

TITLE 29–LABOR

CHAPTER XXV–PENSION AND WELFARE BENEFITS ADMINISTRATION, DEPARTMENT OF LABOR

PART 2510–DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER—
Table of Contents

Sec. 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term ``employee benefit plan'' for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

(b) Plans without employees. For purposes of title I of the Act and this chapter, the term ``employee benefit plan'' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called ``Keogh'' or ``H.R. 10'' plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I.
Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

(d) Participant covered under the plan. (1)(i) An individual becomes a participant covered under an employee welfare benefit plan on the earlier of–

(A) The date designated by the plan as the date on which the individual begins participation in the plan;

(B) The date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or

(C) The date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

(ii) An individual becomes a participant covered under an employee pension plan–

(A) In the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of–

(1) The date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) The date designated by the plan as the date on which the individual has satisfied the plan's age and service requirements for participation, and

(B) In the case of a plan which does not provide for employee contributions and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining–

(1) Whether the individual is entitled to benefits under the plan, or

(2) The amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual–

(A) Is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) Is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if–

(A) The entire benefit rights of the individual–

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(2) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term ``year of service'' shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term ``one-year break in service'' shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.

26 U.S.C. § 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section -

(13) Assignment and alienation. -

(A) In general. - A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders. -

Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) Special rule for certain judgments and settlements. -

Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if -

(i) the order or requirement to pay arises -

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(iii) in a case in which the survivor annuity requirements of section 401(a)(11) apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made -

(I) either such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 417(a)(2)(B)), or an election to waive the right of the spouse to either a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 417(a),

(II) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of such subtitle, or

(III) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 401(a)(11)(A)(i) and under a qualified preretirement survivor annuity provided pursuant

to section 401(a)(11)(A)(ii), determined in accordance with subparagraph (D).

A plan shall not be treated as failing to meet the requirements of this subsection, subsection (k), section 403(b), or section 409(d) solely by reason of an offset described in this subparagraph.

(D) Survivor annuity. -

(i) In general. - The survivor annuity described in subparagraph (C)(iii)(III) shall be determined as if -

(I) the participant terminated employment on the date of the offset,

(II) there was no offset,

(III) the plan permitted commencement of benefits only on or after normal retirement age,

(IV) the plan provided only the minimum-required qualified joint and survivor annuity, and

(V) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(ii) Definition. - For purposes of this subparagraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 411(a)(7)) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the

protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which -

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member

of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1056. Form and payment of benefits

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph -

(i) the term "qualified domestic relations order" means a domestic relations order -

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the

right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs

(C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which -

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies -

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order -

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee -

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of -

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order -

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan -

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures -

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v) -

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would

have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in -

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H), then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension

benefit plan against an amount that the participant is ordered or required to pay to the plan if -

(A) the order or requirement to pay arises -

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle, or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made -

(i) either -

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c)(2)(B) of this title), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity

under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if -

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

OCT 21 2002

No. 02-458

IN THE

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C., Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON, Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented for review is whether the bankruptcy court correctly held that the Respondent, the Trustee in the bankruptcy case, may avoid and recover a preferential transfer under Sections 547 and 550 of the Bankruptcy Code (11 U.S.C. §§ 547 and 550) from the Defendants/Petitioners. The Defendants/Petitioners, the pension plan and its trustee, are the recipients of the transfer. The debtor, in his individual capacity as a bankruptcy debtor, is not a party to these proceedings.

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STATEMENT OF THE CASE

Introduction

Respondent, William T. Hendon, Trustee, respectfully submits that the Petition for Writ of Certiorari file by the Petitioners do not present compelling reasons justifying review by this Court.

Respondent filed this action seeking to avoid and recover a preferential transfer under Sections 547 and 550 of the Bankruptcy Code (11 U.S.C. §§ 547 and 550) from the Defendants/Petitioners. (Appendix page 23). The bankruptcy debtor was not sued in his individual capacity and the Respondent has not sought in this adversary proceeding to recover from the debtor his interest in the pension plan. The Respondent has simply filed a preference action directly against the pension plan for debt re-payments it received within 90 days of the debtor filing for bankruptcy relief.

The only defense raised by the Petitioners on appeal has related to the claim that the funds were excluded from the debtor's bankruptcy estate, alleging that such funds were in an ERISA-qualified plan. Again, the Respondent is not directly pursuing in this adversary matter a claim against the debtor. Affirming the rulings of the lower courts, the United States Court of Appeals for the Sixth Circuit held that the plan was not an ERISA-qualified plan as to the debtor. *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002).

In support of their Petition for Writ of Certiorari, the Appellants assert that the Sixth Circuit's decision in *Yates*,

and its decision in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), conflict "with the decisions of nine other circuit courts" and this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992), asserting the same arguments that they made below. Respondent will address each of these assertions separately.

A. The holding of the Sixth Circuit Court of Appeals Yates does not conflict with the decision of this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992).

Petitioners argue that the Panel's decision in this case and in the *Fugarino* case are inconsistent with the United States Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992).

In *Darden*, the sole issue was whether the claimant was an "employee" or an "independent contractor" as defined under ERISA. In making this determination, the Supreme Court noted that the term "employee" was not specifically defined in ERISA and that courts should look to traditional common law criteria of agency, such as control, in making this determination. *Id.*, at 323.

Unlike the issue before the Court in *Darden*, the issue here relates to Dr. Yates' status as employer or employee. The record before the Court indicates that Dr. Yates is the sole shareholder of Raymond B. Yates, M.D., P.C., a Tennessee professional corporation, albeit inactive at the commencement of the bankruptcy case. (Joint Appendix at page 47). This fact alone indicates that Dr. Yates, as sole

shareholder of the entity, exercised control over its operations and employees. No other facts are contained in this record relating to Dr. Yates' status as an *employee*.

This employer/employee conflict and the application of *Darden* in resolving the definition, was addressed by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593 (9th Cir. 1998), a case cited by the Petitioners. In that case, the court was reviewing the bankrupt's claim to exempt his interest in his pension plan and the bankrupt's status as an employer or employee. The bankrupt was the sole shareholder of his medical corporation. In discussing the applicability of *Darden*, the court stated:

> In *Darden*, the Supreme Court addressed a different issue. Whereas here, the issue is one of a "dual status" employer-employee, in *Darden*, the issue involved the distinction between "employees" and "independent contractors."... In deciding whether Darden could properly be considered Nationwide's "employee" for purposes of ERISA, the Court held that the term "employee" as it appears in ERISA, 29 U.S.C. § 1002(6), incorporates "traditional agency law criteria for identifying master-servant relationships.
>
> The traditional agency criteria can be applied logically only in situations involving relationships between two different persons, i.e., those who employ persons and those who are so employed. Accordingly, *Darden* instructs that we apply the traditional agency definition of "employee" when confronted with the question of whether a specific individual is, in relation to another, an employee

> or an independent contractor for purposes of ERISA. The issue we confront here is different. It is whether a self-employed owner is also his own "employee" for purposes of qualifying his Plan under ERISA. Traditional agency law criteria provide no answer. Thus, we cannot logically apply *Darden* in this case.

Id., at 597. (citations and emphasis omitted).

Likewise, *Darden*, cannot be logically applied to the Petitioners' assertion that although Dr. Yates is the sole owner of his professional corporation, he is nevertheless an employee under ERISA. Accordingly, neither *Fugarino* nor *Yates* conflicts with this Court's decision in *Darden*.

B. The holding of the Sixth Circuit Court of Appeals *Yates* is not in conflict with the decisions of "nine other circuit courts" and does not lead to conflicting results.

As a further basis in support of their argument that this Court should grant the Writ, Petitioners assert that the Sixth Circuit's decision conflicts with the decisions of "nine other circuit courts." However, a careful examination of these cases reveals that such is not the case.

As indicated above, the precise issue herein relates to the status of the bankrupt as employer or employee under ERISA. In construing the language of ERISA and the regulations, particularly 29 C.F.R. § 2510-3.3(c)(1), the Sixth Circuit has held that sole owners or shareholders of employers may not be participants under an ERISA qualified plan. *Agrawal v. Paul Revere Life Insurance Co.*, 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and Accident Ins.*

Co., 969 F.2d 178 (6th Cir. 1992); and *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). Many of the decisions of the other circuits cited by the Petitioners as being in direct conflict with these decisions are readily distinguished on their facts.

For instance, some of the cases from the other circuits cited by the Petitioners deal with the issue of whether a particular claimant is a "beneficiary" under a group health benefit plan under ERISA. *See, e.g., Wolk v. Unum Life ins. of America*, 186 F.3d 352 (3d Cir. 1999); and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001). In each of these cases, the courts held that the claimants were entitled to benefits under the group health plan and were thus beneficiaries of the plan as defined by ERISA. *Wolk*, at 358. ERISA's definition of beneficiary is not as issue herein.

In other instances, the courts were focusing on combined plans or groups of plans. *See, e.g., Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); and *Laventure v. Prudential Ins. Co. of America*, 237 F.3d 1042 (9th Cir. 1998). In those cases, the courts held that a plan not qualifying as an ERISA plan was not converted into a qualifying ERISA plan by either later offering it to other employees or combining it with other qualified plans. *Slamen*, at 1106; and *Laventure*, at 1047.

Other cases deal with the question of whether minority shareholders are "employers" or whether other family members of an owner are "employers." *See, e.g., Leckey v. Stefano*, 263 F.3d 267, 272 (3d Cir. 2001), (holding that a step daughter of an owner was not an "employer"). In *Simpa v. Mass. Cass. Ins. Co.*, 256 F.3d 1006, 1011 (10th Cir. 2001)

and *In re Baker*, 114 F.3d 636, 639 (7th Cir. 1997), these courts held that owners of less than one hundred percent of the stock in the employer were not excluded from ERISA's definition of participant. In fact, the court in *Baker* expressly distinguished instances where the corporation was owned by a single individual, as is case *sub judice*. *Id.*

Finally, in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 597 (9th Cir. 1998), the court held that the sole shareholder of the corporation/employer was not an "employee" for purposes of ERISA. Although this case is cited by the Petitioners as being in conflict with the decisions of this circuit, *Watson* actually supports the decisions of this Court.

Respondent does concede that some decisions of other circuits appear to conflict with the decisions of the Sixth Circuit. *See, e.g., Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1999), and *Vega v. Nat. Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999). In these cases, the courts limit the provisions of 29 C.F.R. § 2510-3.3(c)(1) to initial determinations of whether a plan meets the definition of an "employee benefit plan" but apply these definitions no further, an approach espoused by the Petitioner. However, in cases such as this case where the person holds a dual status, such an approach may produce the conflicting result of the same person being an employer in one instance yet an employee in another. The decisions of the Sixth Circuit yield no such result. According, *Yates* should not be reversed and further proceedings herein are not necessary.

C. The holding of the Sixth Circuit Court of Appeals in *Yates* does not conflict with ERISA.

Petitioners also assert that *Yates* conflicts with a plain reading of ERISA. However, as stated by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998), "the plain language of ERISA is ambiguous with respect to the classification of a 'dual status' employer/employee." Further, this Court has expressly stated that ERISA's definition of "employee" is "completely circular and explains nothing." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 1348, 117 L. Ed. 581 (1992). Therefore, ERISA's provisions in this regard can hardly be described in terms of "plain language."

What is plain is that 29 C.F.R. § 2510-3.3(c)(1) clearly provides that sole owners of corporate employers are not employees. As set forth above, courts have differed as to the scope of this provision. The approach applied in the Sixth Circuit leads to the appropriate result in these dual status type cases and results in the most consistent application of ERISA.

Further, Respondent submits that it is important to keep the purposes of ERISA in mind. Again as stated by the Court in *Watson:*

> ERISA Title I was adopted by Congress in 1974, in part, to remedy abuses by employers who manage pension plans assets held in trust for workers in traditional employer-employee relationships. Congress recognized that workers, i.e., traditional "employees" are vulnerable to abuse by employers because employers typically

> maintain exclusive control over the pension funds of their employees. In contrast, a self-employed individual such as Watson, has complete control over the amount, investment and form of the fund because he voluntarily creates and manages it for his own retirement. Congress had no reason to extend ERISA coverage to self-employed owners such as Watson. Self interests provides adequate protection. Therefore, it was reasonable for the Department of Labor to exclude self-employed sole shareholders from its definition of "employees" for purposes of ERISA.

Id., at 598.

Examples of such possibilities for abuse are present in the case at hand. The plan here limits the availability of loans and provides that any loans must be for a period of less than 5 years. (Appendix at page 148). The plan further requires repayments by payroll deductions made at lease quarterly. (Id.). Contrary to such plan requirements, the loan to the debtor was outstanding from 1989 until November of 1996. (Appendix at page 448). During that time, no payments were made. (Appendix at page 54 and at page 448-449). Shortly before the commencement of this bankruptcy case, in excess of $50,467.00 is repaid to the pension plan. Clearly, the debtor's actions in total disregard of the limitations contained in the plan evidence the kinds of potential abuses discussed above. The debtor should not be permitted to withdraw funds from his "plan," treat them as his own for years without the requirement of making payments in violation of the plan, and then after repayment and the commencement of a bankruptcy case assert that he was subject to the restrictions of an ERISA qualified plan.

D. The result of *Yates* can be affirmed on other grounds.

Finally, the avoidance and recovery of the preferential transfers can be affirmed on other grounds.

Again, it is important to consider the nature of this case. This is *not* a case by a bankruptcy trustee seeking to recover from an *individual debtor* an interest that debtor owned in a pension plan. This *is* an action by the trustee against a third party, (the Plan) seeking to recover preferential transfers made in repayment of an antecedent debt on the eve of bankruptcy. Consequently, the Respondent submits that this case can be resolved without an examination as to whether *the debtor's interest* in the Plan is excluded from the bankruptcy estate for whatever reason.

ERISA, particularly 29 U.S.C. § 1144(d) provides "[N]othing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . ." The plain language of this provision indicates that ERISA was not intended to supersede other federal law. Lower courts and commentators considering this provision have found that the clear language of ERISA does not usurp the avoidance powers of a trustee set forth in Section 547 of the Bankruptcy Code. *See, e.g., Pulaski Highway Express, Inc. v. Central State Southeast and Southwest Areas Health and Welfare and Pension Funds, (In re Pulaski Highway Express, Inc.)*, 41 B.R. 305 (M.D. Tenn. 1984); *Lavergne v. Central State Southeast and Southwest Areas Health and Welfare and Pension Funds (In re Ottawa Carthage, Inc.)*, 55 B.R. 371 (D.C.N.D. Ill. 1985); and *Norton Bankruptcy Law and Practice*, Second Ed., Section 156.12, Pages 156-40 through 156-47.

Therefore, even if the debtor's interest in this plan did qualify for the protections of ERISA, the Respondent could nevertheless recover on his claim against the pension plan. Accordingly, the decisions of the lower courts can be affirmed on other grounds and the Writ for Certiorari should not issue.

CONCLUSION

For the reasons cited herein, the Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

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No. 02-458

In the Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN, AND RAYMOND B. YATES, TRUSTEE, PETITIONERS

v.

WILLIAM T. HENDON, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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36 pp

QUESTION PRESENTED

Whether the working owner of a business (here, the sole shareholder of a corporate employer) is precluded from being a "participant" under Section 3(7) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(7), in an ERISA plan.

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In the Supreme Court of the United States

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v.

WILLIAM T. HENDON, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case presents the question whether a working owner (such as a sole shareholder, sole proprietor, or partner who renders services to a business) may be a participant in an ERISA plan. The court of appeals' holding that working owners are precluded from being ERISA participants erroneously disregards this Court's precedent, the text of ERISA, and guidance provided by the Department of Labor. The decision deepens a conflict among the courts of appeals on an important issue and thus warrants this Court's review.

1. Dr. Raymond B. Yates was a practicing physician and the sole shareholder and president of a professional corporation known as Raymond B. Yates, M.D., P.C. Pet. App. 2a, 10a. The corporation maintained the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the plan), for which Dr. Yates was the plan administrator and trustee. *Id.* at 2a-3a. As of June 30, 1996, four persons were designated as plan participants, including Dr. Yates. *Id.* at 3a. From its inception, the plan always had at least one participant other than Dr. Yates or his wife. See *id.* at 10a.

The plan was tax-qualified under Section 401 of the Internal Revenue Code, 26 U.S.C. 401, see Pet. App. 2a-3a, and contained an anti-alienation provision as required both by the Code, 26 U.S.C. 401(a)(13), and by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056(d). Pet. App. 4a. That provision, entitled "Spendthrift Clause," provided in relevant part:

> Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily.

Id. at 11a. Article 12 of the plan, which authorized participant loans, also imposed various requirements specified by ERISA and the Code, including that the loan be adequately secured by the participant's accrued benefit, that the loan bear a reasonable rate of interest, and that the participant make repayments at least quarterly over a period not to exceed five years. C.A. App. 235-236; see 29 U.S.C. 1056(d)(2), 1108(b)(1); 26 U.S.C. 72(p)(2)(B) and (C), 401(a)(13)(A), 4975(d)(1).

In December 1989, Dr. Yates borrowed $20,000 from the plan at 11% interest and pledged as security his vested account balance in the plan. Pet. App. 3a, 11a. The loan was

originally for five years, but it was extended for another five years in June 1992. *Id.* at 3a. Although the loan terms required monthly payments of $433.85, Dr. Yates made no payments on the loan until November 1996, when he repaid the entire principal and interest due in two payments that totaled $50,467.46. *Id.* at 3a, 11a. On December 2, 1996, three weeks after the repayment, an involuntary bankruptcy petition was filed against Dr. Yates under Chapter 7 of Title 11 of the United States Code (11 U.S.C. 701 *et seq.*). Pet. App. 3a.

2. Several months later, respondent William T. Hendon, the trustee in bankruptcy, commenced this adversary proceeding under 11 U.S.C. 547(b) and 550 against the plan and Dr. Yates as plan trustee (petitioners herein) in the United States Bankruptcy Court for the Eastern District of Tennessee. Respondent asked the court to set aside the loan repayment as a preferential transfer and to order the plan to pay the money to respondent. Pet. App. 3a. The parties each filed motions for summary judgment. *Id.* at 37a. The court granted summary judgment to respondent. *Id.* at 36a-50a.

The court rejected petitioners' argument that Dr. Yates's interest in the plan was excluded from his bankruptcy estate under 11 U.S.C. 541(c)(2). Pet. App. 43a-47a. Section 541(c)(2) provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. 541(c)(2). In *Patterson* v. *Shumate*, 504 U.S. 753 (1992), this Court held that the anti-alienation provision of ERISA is "applicable nonbankruptcy law" within the meaning of Section 541(c)(2). 504 U.S. at 757-765. The bankruptcy court nonetheless concluded that Dr. Yates's interest in the plan was not excluded from his bankruptcy estate. The court reasoned that Dr. Yates, as the "self-employed owner of the professional corporation that sponsors the pension plan," "cannot participate as an

employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest" in the plan. Pet. App. 43a-44a (citing *SEC* v. *Johnston*, 143 F.3d 260 (6th Cir. 1998); *Fugarino* v. *Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), cert. denied, 506 U.S. 966 (1993); and 29 C.F.R. 2510.3-3(c)(1)).

3. The United States District Court for the Eastern District of Tennessee affirmed the judgment of the bankruptcy court. Pet. App. 9a-35a. The district court considered itself bound by prior Sixth Circuit decisions that had held that neither a sole proprietor, *Fugarino*, *supra*, nor a sole shareholder of a corporate employer, *Agrawal* v. *Paul Revere Life Ins. Co.*, 205 F.3d 297 (2000), may be a participant in an ERISA plan. Pet. App. 15a-21a. Those decisions relied in significant part on a Department of Labor regulation, 29 C.F.R. 2510.3-3(c)(1), which the decisions interpreted to exclude sole owners and their spouses from the definition of "employee" for purposes of Title I of ERISA and therefore also from the definition of a plan "participant." See 29 U.S.C. 1002(6) (defining "employee" as "any individual employed by an employer"); 29 U.S.C. 1002(7) (defining "participant" as an "employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan"). The district court acknowledged that the regulation is better read to address only which plans are covered by Title I of ERISA, and to permit sole owners to participate in ERISA plans that also cover other employees, as other circuits have held. Pet. App. 19a (citing *Madonia* v. *Blue Cross & Blue Shield*, 11 F.3d 444 (4th Cir. 1993), cert. denied, 511 U.S. 1019 (1994), and *Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287 (5th Cir. 1999)). But the court concluded that it was bound by Sixth Circuit precedent, under which Dr. Yates "was not qualified to participate in an ERISA protected plan." *Id.* at 20a.

4. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. Pet. App. 1a-8a. The court reasoned that the plan's anti-alienation clause is not "enforceable under applicable nonbankruptcy law" within the meaning of 11 U.S.C. 541(c)(2) because it "is not enforceable by Dr. Yates under ERISA." Pet. App. 6a.

The court of appeals noted that ERISA provides that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." Pet. App. 5a (quoting 29 U.S.C. 1132(a)(3)(b)(ii)). But the court reasoned that, under *Fugarino* and *Agrawal*, Dr. Yates, as a sole shareholder, "cannot qualify as a 'participant or beneficiary' in an ERISA pension plan." *Ibid.* Concluding that those circuit precedents dictate that Dr. Yates "does not have standing under the ERISA enforcement mechanisms," *ibid.* (quoting *Agrawal*, 205 F.3d at 302), the court held that "the spendthrift clause in the * * * plan is not enforceable by Dr. Yates under ERISA." *Id.* at 6a.

The full court subsequently denied a petition for rehearing en banc. Pet. App. 51a.

DISCUSSION

This Court's review is warranted to resolve a conflict among the courts of appeals on whether a working owner (such as a sole shareholder, sole proprietor, or partner who renders services to a business) may be a participant in an ERISA plan that also covers other employees. The court of appeals erroneously held that working owners who own the entire interest in a business are not eligible to participate in ERISA plans. This Court's intervention to correct the court of appeals' error is important because the question whether working owners may be participants in ERISA plans arises frequently and in a variety of contexts.

A. The Courts Of Appeals Are Divided On Whether Working Owners May Be Participants In ERISA Plans

1. ERISA seeks "to protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). Title I (29 U.S.C. 1001 *et seq.*) contains provisions, administered and enforced primarily by the Department of Labor, that govern reporting and disclosure, fiduciary responsibility, and plan administration and enforcement, as well as substantive requirements for group health plans. Title II, 88 Stat. 898 (codified in various provisions of Title 26 of the United States Code), contains amendments to Internal Revenue Code provisions governing when employee benefit plans qualify for favorable tax treatment. Title III (29 U.S.C. 1201 *et seq.*) contains miscellaneous administrative provisions, and Title IV (29 U.S.C. 1301 *et seq.*) requires the Pension Benefit Guaranty Corporation (PBGC) to guarantee benefits to participants in and beneficiaries of defined benefit pension plans.

Title I of ERISA defines a "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). Title I defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8). And Title I defines "employee" as "any individual employed by an employer." 29 U.S.C. 1002(6). Participants and beneficiaries are authorized

to bring civil actions to enforce their rights under ERISA and ERISA plans. 29 U.S.C. 1132(a).[1]

2. There is a conflict among the circuits on whether sole shareholders who work for the corporations that they own may be participants in ERISA plans that cover them and other employees of the corporations. The courts of appeals have also taken divergent approaches in deciding whether working owners of other business forms, such as sole proprietorships and partnerships, may be participants in ERISA plans.

The First and Sixth Circuits have held that a sole shareholder may not be a "participant" in a plan covered by Title I of ERISA. See *Kwatcher* v. *Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989); *Agrawal* v. *Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000); Pet. App. 1a-8a. In direct conflict, the Fourth and Fifth Circuits have held that a sole shareholder may be a participant. *Madonia* v. *Blue Cross & Blue Shield*, 11 F.3d 444 (4th Cir. 1993), cert. denied, 511 U.S. 1019 (1994); *Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287 (5th Cir. 1999).

Although the question presented in the certiorari petition does not appear to encompass the issue, see Pet. i, there is also a conflict among the circuits on whether a sole shareholder may be a "beneficiary" of an ERISA plan. The Sixth Circuit, in *Agrawal* and in this case, has held that a sole shareholder may not be designated as a beneficiary, while the Eighth and Eleventh Circuits have held that a sole shareholder may be designated as a beneficiary. *Robinson* v. *Linomaz*, 58 F.3d 365 (8th Cir. 1995); *Gilbert* v. *Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001).[2]

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[1] Plan fiduciaries are also authorized to bring civil actions to enforce the terms of ERISA and ERISA plans. 29 U.S.C. 1132(a)(3).

[2] Several circuits (including the Sixth) have addressed coverage of other substantial or controlling shareholders and have uniformly held that such shareholders may participate in ERISA plans sponsored by their

Regarding other types of working owners, the Sixth and Seventh Circuits have held that sole proprietors may not be participants in ERISA plans. *Fugarino* v. *Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), cert. denied, 506 U.S. 966 (1993); *Giardono* v. *Jones*, 867 F.2d 409 (7th Cir. 1989). In dicta, the Tenth Circuit has expressed its agreement with that view, *Peckham* v. *Board of Trustees*, 653 F.2d 424, 427-428 (1981), and the Second Circuit has expressed its disagreement, *Schwartz* v. *Gordon*, 761 F.2d 864, 869 (1985). The Third and Ninth Circuits have held that partners may be beneficiaries of ERISA plans. *Wolk* v. *UNUM Life Ins. of Am.*, 186 F.3d 352 (3d Cir. 1999), cert. denied, 528 U.S. 1076 (2000); *Peterson* v. *American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir.), cert. denied, 516 U.S. 942 (1995); *Harper* v. *American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990). But the Ninth Circuit has stated, in dictum, that partners may not be participants. *Peterson*, 48 F.3d at 408; *Harper*, 898 F.2d at 1434.[3]

Although the foregoing cases involving sole proprietors and partners have not yet generated a conflict, they reflect the same divergence in approach to the treatment of working owners that has produced the conflict regarding sole shareholders. This Court's resolution of the conflict regarding sole shareholders would therefore likely provide substantial assistance in resolving the broader uncertainty and confusion concerning the treatment of working owners generally.

corporate employers. *Leckey* v. *Stefano*, 263 F.3d 267 (3d Cir. 2001); *Santino* v. *Provident Life & Accident Ins. Co.*, 276 F.3d 772 (6th Cir. 2001); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Prudential Ins. Co. of Am.* v. *Doe*, 76 F.3d 206 (8th Cir. 1996); *Sipma* v. *Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Engelhardt* v. *Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998).

[3] The remaining cases cited by petitioners (Pet. 8) as evidencing a circuit conflict address whether particular plans are covered by Title I of ERISA, not whether working owners can be participants in covered plans. *LaVenture* v. *Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001); *Slamen* v. *Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); *In re Watson*, 161 F.3d 593 (9th Cir. 1998); *Schwartz* v. *Gordon*, 761 F.2d 864 (2d Cir. 1985).

B. The Court Of Appeals' Holding That Working Owners Are Precluded From Being Participants In ERISA Plans Is Erroneous

This Court's review is also warranted because the court of appeals' decision in this case is incorrect. Without analyzing the issue independently, that court followed circuit precedent and held that "a sole shareholder cannot qualify as a 'participant or beneficiary' in an ERISA pension plan." Pet. App. 5a. That holding disregards the guidance provided by this Court's decision in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992), and the text of ERISA, and it conflicts with an advisory opinion issued by the Department of Labor and misinterprets a Department of Labor regulation.

1. In *Darden*, this Court addressed whether an insurance salesman was a "participant" under Title I of ERISA in a retirement plan sponsored by the insurance company whose policies the agent sold. The Court explained that generally an individual can qualify as a "participant" only if the individual is an "employee," which ERISA defines as "any individual employed by an employer." 503 U.S. at 320-321 (quoting 29 U.S.C. 1002(6) and (7)). Finding the latter definition "completely circular," the Court looked elsewhere to determine whether the salesman was an "employee" or was instead an independent contractor. *Id.* at 323. Because the Court could not find "any provision [in ERISA] either giving specific guidance" on how to differentiate between an employee and an independent contractor or suggesting that adopting the traditional common-law test to distinguish between the two categories "would thwart the congressional

design or lead to absurd results," the Court adopted the common-law test. *Ibid.*

The precise question in *Darden* was different from the question presented here. The question in *Darden* was whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" in an ERISA plan because he is an independent contractor. Here, the question is whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" because he is the business's owner. Nonetheless, *Darden* sets forth the appropriate mode of analysis for resolving the question presented here. The first step is to determine whether any provisions of ERISA itself furnish guidance on whether the working owner of a business may be a plan participant. If the statutory text provides no guidance, then common-law principles should be used to resolve the question, provided their application would not thwart the congressional design or lead to irrational consequences.

2. There is no need to proceed beyond the first step in this case because Title I of ERISA contains several provisions that plainly contemplate that working owners may be participants in employee benefit plans. For example, Title I generally requires that all assets in covered plans be held in trust. 29 U.S.C. 1103(a). But 29 U.S.C. 1103(b)(3)(A) exempts from that requirement (subject to certain qualifications) a plan "some or all of the *participants* of which are *employees* described in section 401(c)(1) of [the Internal Revenue Code]" (emphasis added). Section 401(c)(1) provides that the term "employee," for purposes of Section 401 (which prescribes the criteria under which pension plans qualify for favorable tax treatment), includes a "self-employed individual." 26 U.S.C. 401(c)(1)(A). That term is in turn defined as a person with "earned income" from "a trade or business in which personal services of the taxpayer

are a material income-producing factor," a definition that includes sole proprietors and partners. See 26 U.S.C. 401(c)(1)(B) and (2)(A)(i), 1402(a) and (c). The exemption from the trust requirements under Title I of ERISA would be meaningless unless working partners and sole proprietors may be participants in ERISA plans.

ERISA's prohibited transaction provisions also contemplate that working owners may be plan participants. ERISA generally prohibits transactions between a plan and a party in interest, 29 U.S.C. 1106, but contains an exemption for loans to plan participants that meet certain conditions. One condition is that the loans not discriminate in favor of "highly compensated employees (within the meaning of section 414(q) of [the Internal Revenue Code])." See 29 U.S.C. 1108(b)(1)(B). A "highly compensated employee" includes "any employee" who owns more than five percent of the stock of a corporate employer or more than a five percent interest in a non-corporate employer. 26 U.S.C. 414(q)(1)(A) and (2); 26 U.S.C. 416(i)(1)(B)(i). Furthermore, 29 U.S.C. 1108(d)(1) excludes from the participant loan exemption an "owner-employee" as defined in Section 401(c)(3) of the Internal Revenue Code. An "owner-employee" means an employee who is either a sole proprietor or a partner who owns more than 10% of the partnership. 26 U.S.C. 401(c)(3). Thus, the participant loan provisions treat shareholders, sole proprietors, and partners as potential plan participants.

That reading of Title I of ERISA is reinforced by related statutory provisions. Most notably, ERISA was enacted against a background of Internal Revenue Code provisions that permitted and continue to permit working owners (including sole shareholders, sole proprietors, and partners) to participate in pension plans that meet the qualifications for favorable tax treatment, including that the plans be "for the exclusive benefit of * * * employees." 26 U.S.C. 401(a). See, *e.g.*, 26 U.S.C. 401(c) (1970 and 2000) ("employee" under

Section 401 includes "self-employed individuals," including "owner-employees"); 26 C.F.R. 1.401-1(b)(3) (1973 and 2002) ("Among the employees to be benefited may be persons who are officers and shareholders."); Rev. Rul. 72-4, 1972-1 C.B. 105 (pension plan that benefits "principal or sole shareholder" may qualify under 26 U.S.C. 401(a)). Indeed, corporate shareholders who are employees have been treated as "employees" eligible to participate in tax-qualified pension plans since 1942. Revenue Act of 1942, ch. 619, 56 Stat. 862 (former 26 U.S.C. 165(a)(4)); see S. Rep. No. 992, 87th Cong., 1st Sess. 8-9 (1961). And, in 1962, Congress enacted the Self-Employed Individuals Tax Retirement Act, Pub. L. No. 87-792, 76 Stat. 809, authorizing the creation of "Keogh" plans for partners and sole proprietors, for the specific purpose of giving "self-employed persons access to retirement plans on a reasonably similar basis to that accorded corporate shareholder employees." S. Rep. No. 992, *supra*, at 8.

The plan termination insurance provisions in Title IV of ERISA also expressly contemplate participation by working owners in ERISA plans. Title IV generally applies to any employee pension benefit plan, as defined in 29 U.S.C. 1002(2), that is not an individual account plan and that meets specified requirements in the Internal Revenue Code, including qualification under Section 401(a). 29 U.S.C. 1321(a)-(c). Title IV excepts from its coverage any plan "established and maintained exclusively for substantial owners," 29 U.S.C. 1321(b)(9), which include sole proprietors, and partners and shareholders with an ownership interest of more than 10%, 29 U.S.C. 1322(b)(5)(A). Plans in which substantial owners participate along with other employees are, however, generally covered by Title IV. See 29 U.S.C. 1322(b)(5)(B) (limiting amount of benefits that PBGC will

guarantee to substantial owners who participate in single-employer plans).[4]

These statutory provisions reveal a clear congressional intent to include working owners within the definition of "participant" under Title I of ERISA. The alternative—that working owners may participate in tax-qualified pension plans under the Internal Revenue Code, and even have some of their pension benefits guaranteed by the PBGC, but have no enforceable rights under Title I—would make scant sense. Working owners would be encouraged through the receipt of tax benefits to participate in ERISA plans with other employees but would have different rights and remedies than those of other participants under the same plan. See pp. 17-18, *infra*. The PBGC would be required to guarantee pension benefits to persons who are not plan participants under Title I and thus do not have the tools that Title provides to protect their rights, a situation that could shift costs from the private pension system to the federal government for no discernible policy reason. Those are just the kind of "absurd results" this Court warned against in *Darden*. 503 U.S. at 323.[5]

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[4] Title IV also excepts from its coverage plans with 25 or fewer active participants that are "established and maintained by a professional service employer." 29 U.S.C. 1321(b)(13). A "professional service employer" includes a professional corporation of the type involved in this case. 29 U.S.C. 1321(c)(2). The inclusion of this exception indicates that such plans would otherwise be covered by Title IV.

[5] Because the text of ERISA demonstrates that a working owner may be a participant in an ERISA plan, there is no cause to resort to the common law. See *Darden*, 503 U.S. at 323. This Court's recent decision in *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 123 S. Ct. 1673 (2003), therefore provides little assistance in resolving the question presented here. In *Clackamas*, the Court endorsed the Equal Employment Opportunity Commission's test, drawn from common-law principles, for determining whether partners and major shareholders are employees under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, since the text of the ADA was silent on how to resolve that question.

3. Based on the above considerations, the Department of Labor has concluded in an advisory opinion that working owners may be "participants" within the meaning of Title I of ERISA. See Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Advisory Opinion No. 99-04A (Feb. 4, 1999) (*reprinted in* App., *infra*, 1a-9a). That opinion of the agency charged by Congress with the administration of Title I of ERISA reflects a "body of experience and informed judgment to which the courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Although petitioners alerted the court of appeals to the advisory opinion, the court did not discuss it. Instead, the court followed its own prior opinion, which had placed significant reliance on a Department of Labor regulation, 29 C.F.R. 2510.3-3(c)(1). See Pet. App. 5a-6a (citing *Fugarino*, 969 F.2d at 186). That prior opinion, like the decision of the other court of appeals that has held that sole shareholders may not be ERISA plan participants, misconstrued the regulation. Those cases mistakenly read the regulation as providing a general definition of the statutory term "employee" that excludes sole shareholders, thereby precluding them from being plan participants. See *ibid.*; *Kwatcher*, 879 F.2d at 961-962; see also *Giardono*, 867 F.2d at 412. Contrary to that reading, as explained by the courts of appeals that have held that sole shareholders may be plan participants, the regulation does not define the statutory term "employee." Nor does it identify who is eligible to be a "participant" in a plan covered by ERISA. Rather, the regulation addresses what plans are covered by Title I of ERISA in the first

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Because resolution of the question presented here turns on the text of ERISA, rather than common-law principles, there is no reason for the Court to grant, vacate, and remand this case in light of *Clackamas*.

place. See *Vega*, 188 F.3d at 294; *Madonia*, 11 F.3d at 449-450; see also *Gilbert*, 276 F.3d at 1302-1303.

The regulation as a whole is entitled "employee benefit plan," and its numbering, Section 2510.3-3, corresponds to Section 3(3) of ERISA, 29 U.S.C. 1002(3), the statutory definition of the term "employee benefit plan." Subsection (a) of the regulation explains its scope: it "clarifies the definition in section 3(3) of the term 'employee benefit plan' for purposes of title I of the Act." 29 C.F.R. 2510.3-3(a). Subsection (b) of the regulation, entitled "[p]lans without employees," provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan." 29 C.F.R. 2510.3-3(b). It explains, for example, that, although a "Keogh" or "H.R. 10" plan covering only partners or a sole proprietor will not be covered under Title I, "a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I." 29 C.F.R. 2510.3-3(b). Subsection (c) of the regulation is entitled "Employees" and states:

> For purposes of this section [*i.e.*, for purposes of the regulation defining a covered plan]:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by that individual and his or her spouse, and
>
> (2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. 2510.3-3(c)(1) and (2).

The regulation thus excludes from Title I coverage plans whose only participants are sole owners or partners and their spouses. Subsection (c) identifies who may not be deemed an "employee" only for purposes of the regulation itself. It does not exclude sole owners or partners from the *statutory* definition of "employee" or from being participants in plans that also cover one or more employees who are not sole owners or partners and their spouses. To the contrary, the regulation makes clear that a "*plan under which* one or more common law employees, in addition to the *self-employed individuals, are participants* covered under the plan, *will be covered under title I.*" 29 C.F.R. 2510.3-3(b) (emphasis added).[6]

4. The courts of appeals that have denied participant status to working owners have also mistakenly relied on ERISA's "anti-inurement" provision, 29 U.S.C. 1103(c)(1). That provision, those courts have reasoned, is transgressed if an owner is also a participant because then the owner, as a participant, may benefit from plan assets. See *Fugarino*, 969 F.2d at 186; *Kwatcher*, 879 F.2d at 959-960; *Giardono*, 867 F.2d at 411. The anti-inurement provision, however, does not preclude coverage of working owners as plan participants. It states that, with enumerated exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1). Accordingly, the provision expressly permits paying benefits to plan participants; it does not answer the separate question whether working owners can be plan participants under ERISA. Indeed, the anti-inurement provision in Title I of ERISA is based on the analogous exclusive benefit provision in the Internal Revenue Code, 26 U.S.C. 401(a)(2), which does not bar plan participation by working owners. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 302-303 (1974); pp. 11-12, *supra*. The purpose of the anti-inurement provision, like ERISA's other fiduciary provisions, is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets. See, *e.g.*, *Prudential Ins. Co. of Am.* v. *Doe*, 76 F.3d at 209. Those concerns are not implicated by paying benefits to working owners who participate on an equal basis in plans protected by other ERISA safeguards.

[6] The fact that the regulation does not provide a general definition of "employee" was made even more explicit in the regulatory preamble. The preamble explained that, in the proposed rules, the definition of "employee" had been located in 29 C.F.R. 2510.3-6 and had defined "employee" for all purposes under Title I, but comments had raised concerns about the implications of a general definition for other provisions in ERISA. In response, "the definition of 'employee' formerly appearing in proposed § 2510.3-6 [was] inserted into § 2510.3-3 and restricted in scope to that section." 40 Fed. Reg. 34,528 (1975).

C. The Question Presented Is Important And Should Be Resolved By This Court

It is important for this Court to correct the error of the court of appeals because the question presented not only has divided the courts of appeals but also affects the rights and duties of ERISA actors in many contexts. Often, for example, the working owner of a small business who has purchased health or disability insurance for himself and his employees sues the insurance company for denying the owner's personal benefit claim. See, *e.g.*, *Wolk*, *Madonia*, *Vega*, *Fugarino*, *Agrawal*, *Robinson*, *Peterson*, *Gilbert*, *supra*. The owner seeks state law remedies, the insurer invokes ERISA preemption, and the owner claims to be outside the ERISA plan. Courts, such as the Sixth Circuit, that have permitted the owner to split the plan in that manner have concluded that the owner retains his state law remedies, while his employees are limited to what are gener-

ally narrower remedies under ERISA. See, *e.g.*, *Fugarino*, 969 F.2d at 186. That anomalous result defeats two purposes of ERISA: to "ensure[] that the administrative practices of a benefit plan will be governed by only a single set of regulations," *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987), and to "ensure[] similar treatment for all claims relating to employee benefit plans." *Madonia*, 11 F.3d at 450.

In other contexts, such as the one presented by this case, the owner seeks to be recognized as an ERISA participant to gain protections that the owner contends are provided by ERISA, here the protection against alienation of pension benefits. See, *e.g.*, *Kwatcher*, *supra* (sole shareholder suing for benefits from multi-employer plan). In those contexts as well, the Sixth Circuit's rule leads to the anomalous situation in which participants in a single plan have different rights and remedies. Moreover, to the extent that the decisions holding that working owners are not ERISA plan participants also stand for the proposition that the plans themselves have two separate components, one covered by ERISA and the other not covered, the result is even more impracticable. Under the Internal Revenue Code, a pension plan is either tax-qualified or it is not; it is not meaningful to describe a plan as tax-qualified in part. The same is true under Title I of ERISA. Title I requirements, such as the duty to hold plan assets in trust and to manage those assets in accordance with ERISA fiduciary duties, apply to all the assets of the plan. Indeed, in traditional defined benefit plans, in which plan assets are not held in individual accounts, it is impossible to apply ERISA fiduciary duties to only that portion of plan assets earmarked for employees other than working owners.

As noted above, a number of courts have tried to avoid treating working owners and their employees differently under ERISA by allowing the owners to be classified as

ERISA "beneficiar[ies]" under 29 U.S.C. 1002(8). See pp. 7-8, *supra* (citing *Robinson*, *Gilbert*, *Wolk*, *Peterson*, and *Harper*). Those courts reason that ERISA's definition of beneficiary is broad enough on its face to include any "person designated * * * by the terms of an employee benefit plan[] who is or may become entitled to a benefit" under the plan. 29 U.S.C. 1002(8); see, *e.g.*, *Harper*, 898 F.2d at 1434.

That approach, however, has two fundamental flaws. First, it has no logical stopping point: anyone could be "designated * * * by the terms of an employee benefit plan" as a beneficiary, even when that person lacks any employment nexus with the plan sponsor. For instance, in *Hollis* v. *Provident Life & Accident Insurance Co.*, 259 F.3d 410, 415 (5th Cir. 2001), cert. denied, 535 U.S. 986 (2002), the court held that an independent contractor could be designated as a "beneficiary" under an ERISA plan, a result that is in considerable tension with this Court's decision in *Darden* that an independent contractor cannot be a plan "participant." Second, the "beneficiary" theory would enable working owners to assert rights only under welfare plans, and not under pension plans, because the ERISA provisions that govern pension rights use the terms "employee" and "participant," but not the term "beneficiary." See 29 U.S.C. 1052, 1053, 1054. Although a participant in a pension plan may have a beneficiary, such as a surviving spouse, pension credits can only be earned on work performed by an employee; the entitlement of the beneficiary is purely derivative. See 29 U.S.C. 1055; *Boggs* v. *Boggs*, 520 U.S. 833, 846-847 (1997). Thus, the only way to avoid the anomalous results produced by the court of appeals' rule is to reject it.[7]

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[7] Respondent argues (Br. in Opp. 9) that this Court should decline review because there are alternative rationales under which the court of appeals could have reached the same judgment. Neither the district court nor the court of appeals relied on the alternative rationales advanced by respondent, however, and it is not certain that either of those courts

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MAY 2003

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would accept them. The possibility that the court of appeals might arrive at the same judgment after a remand is not a reason for this Court to decline to resolve the important circuit conflict that is squarely presented by the court of appeals' actual decision. See, *e.g.*, Reply Br. at 6, 10 n.4, *Clay* v. *United States*, cert. granted, 536 U.S. 957 (2002) (No. 01-1500); Reply Br. at 1-5, *United States* v. *Bean*, cert. granted, 534 U.S. 1112 (2002) (No. 01-704); Br. Amicus Curiae for the United States at 20, *Edelman* v. *Lynchburg College*, cert. granted, 533 U.S. 928 (2001) (No. 00-1072).

APPENDIX

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

[seal omitted]

Feb. 4, 1999

John P. Counts, Esq.
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Counts & Kanne
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99-04A
ERISA SEC.
3(7)

Dear Messrs. Counts and Potts-Dupre:

This is in response to your request for an advisory opinion containing the definition of "participant" provided in section 3(7) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether individuals who own business enterprises, either wholly or in part, and who provide personal services to those businesses may be "participants," within the meaning of section 3(7) of ERISA, in a multiemployer employee benefit plan. You state that the business enterprises that are the subject of this request include businesses that are operated as corporations, sole proprietorships, and partnerships.

You submit your request on behalf of the National Electrical Benefit Fund (the NEBF), a multiemployer pension plan established jointly by the International Brotherhood of Electrical Workers (IBEW) and the National Electrical Contractors Association (NECA) pursuant to collective bar-

gaining. You describe the NEBF as the largest construction industry fund in the United States, with approximately 375,000 participants, over 14,000 contributing employers, and plan assets of almost five billion dollars.

The documents that you have submitted indicate that an individual can become eligible to participate in the NEBF only as a result of an employer's having executed a participation agreement with the NEBF, obligating the employer to make contributions on behalf of at least some of its employees. *See* Restated Employees Benefit Agreement and Trust for the National Electrical Benefit Fund (hereinafter Trust Agreement), Part I, Provision 4; sections 1.7, 1.8, 1.18, 6.3.3. An employer must agree at a minimum to make contributions on behalf of its bargaining unit employees. *Id.* section 6.3.1. Such an employer may elect, in addition, to contribute on behalf of its "non-bargaining unit employees." An employer may contribute on behalf of all "non-bargaining unit employees" or only those non-bargaining unit employees who were formerly bargaining unit members ("alumni"). *Id.*

With respect to bargaining unit employees, a participating employer must contribute to the NEBF an amount equal to three percent of "all wages and other compensation paid to, or accrued by, the Covered Employees in the . . . bargaining unit for services performed for the Covered Employer." *Id.* section 6.2.1. For non-bargaining unit employees, the employer must contribute to the NEBF an amount equal to the lesser of

> "(a) 3% of all wages and other compensation which the Covered Employer would pay, or which the [non-bargaining unit] Covered Employees would accrue, if the Covered Employees were receiving the wage rate received by the highest number of employees in the appropriate . . . bargaining unit and working the normal straight time hours provided for in the appropriate labor agreement, or (b) 3% of all wages and other compensation paid to, or accrued by, the [non-bargaining unit] Covered Employees for services performed for the Covered Employer. . . ."

Id. Section 6.2.2.

The documents that you have supplied indicate that the NEBF provides a pension benefit, which may be paid as an early retirement pension or a normal retirement pension, and a disability benefit. A participant becomes vested in his or her pension benefit upon earning at least five vesting service credits.[1] Pension benefits for vested participants are calculated by multiplying the participant's benefit service credits[2] by fixed dollar amounts that are specified in the plan. As a result, the amount of a participant's monthly pension benefit is not dependent upon the participant's actual income prior to retirement or the actual amount of contributions that an employer made on his or her behalf, but rather upon seniority in the NEBF.

You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners"[3] to be treated as employees eligible to participate in the NEBF

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[1] One vesting service credit is earned for each year after 1965 in which a participant is credited with 1000 hours of covered service for covered employment (employment during a period for which an employer is obligated to make contributions for that employee).

[2] One benefit service credit is similarly earned for each year after 1965 in which a participant is credited with 1000 hours of covered employment.

[3] By the term "working owner," you apparently mean an individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

and therefore to become participants in the NEBF.[4] The eligible "working owners" include any "owner that earns wages or self-employment income from a company," including sole proprietors of unincorporated businesses. You indicate that the working owners who currently participate in the NEBF are journeyman electricians who had worked initially as bargaining unit members for other employers that contributed to the NEBF on their behalf. They subsequently acquired ownership interests in those employers or started their own electrical businesses, sometimes in partnership with other similarly situated individuals, sometimes by creating wholly-owned corporations, and sometimes operating as sole proprietors. They continue to work as electricians and in some cases employ other union members covered by the NEBF. Most of these working owners had earned vested pension benefits in the NEBF based on their previous service as bargaining unit employees, and they began accruing additional service credits when the NEBF changed its eligibility rules in 1994 to permit working owners to participate.

You represent that the employer's payroll reports, submitted monthly to the NEBF, are used to determine an employer's contributions, based on the working owner's reported "wages," and a working owner's service credits, based on the working owner's reported hours of service. You further represent that reporting employers determine a working owner's "wages" by determining the greater of the working owner's actual gross earnings subject to employment tax for that month or the amount the working

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[4] This current practice has been followed only since January, 1994. In the course of its history (since its creation in the early 1960's), the NEBF's practices have varied regarding participation by individuals who have equity ownership rights in business enterprises that operate in the industry covered by the IBEW.

owner would have earned if he had worked at normal straight-time hours for the month at the applicable journeyman's rate. The working owner's hours of service are reported as the actual hours the working owner worked for the business during the month.

Section 3(7) of Title I of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(6) in turn defines an "employee" as "any individual employed by an employer." Finally, section 3(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

Title I of ERISA contains multiple indications, albeit indirect, that Congress assumed that a "working owner" could be a "participant" in an employee benefit plan sponsored by the business in which that working owner held an ownership right, regardless of the legal form in which the business was operated. For example, section 401(a)(2) exempts certain partnership agreements from the fiduciary provisions of Part 4. This exemption would be meaningless if the partnership agreements themselves (which cover only partners, one of the categories of "working owners") were not otherwise plans covered by Title I. Further, section 403(b)(3)(A) specifically exempts from the trust requirement of section 403(a) a plan "some or all of the *participants* of which are employees described in section 401(c)(1) of the Code [emphasis added]." This exemption takes as its basis

the assumption that the employees described in Code section 401(c)(1), namely self-employed individuals (including "working owners"), are legitimate "participants" within the meaning of Title I. Also, section 408(b)(1) exempts from section 406's prohibition of specified transactions certain nondiscriminatory loans made to plan participants, including highly compensated employees, but section 408(d)(1) eliminates that exemption for owner-employees as defined in section 401(c)(3) of the Code. Inasmuch as the owner-employers described in Code section 401(c)(3) are sole proprietors and more than ten-percent partners, it is clear that the provisions in section 408 of Title I assume that such "working owners" are "participants" in the plans from which those loans would be made.

The indications of Congressional intent are supported and reinforced by the treatment of "working owners" under the provisions of Title II and Title IV of ERISA.[5] Section 401(c) of the Internal Revenue Code (the Code) provides that self-employed individuals are included as "employees" under Code section 401(a) to the extent that they have earned income "with respect to a trade or business in which personal services of the [individual] are a material income-producing factor." Code section 401(c)(2)(A). Code section 401(c) further imposes specific additional requirements on tax-qualified pension plans that provide benefits to "owner-employees," a term defined in Code section 401(c)(3) to include employees who own the entire interest in an unincorporated trade or business or more than 10 percent of a partnership. It is thus patently clear that Title II of ERISA

[5] Although we rely on certain provisions of Title II and Title IV in reaching the conclusions expressed in this opinion, nothing in this opinion should be construed as interpreting the provisions of those Titles that lie within the interpretive jurisdiction of the Department of the Treasury and the Pension Benefit Guaranty Corporation.

permits "working owners" to receive the tax benefits that flow from participation as "participants" in pension plans that meet the qualification requirements of Code section 401(a).

Title IV of ERISA (the termination insurance provisions) also expressly includes "working owners" among the "participants" who receive its protections. *See* ERISA section 4001(b)(1) ("[a]n individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of [Code] section 401(c)(1). . ."). Section 4021(b)(9) of ERISA excludes from coverage under Title IV only those pension plans that are "established and maintained exclusively for substantial owners," i.e., sole proprietors and more than ten-percent owners of partnerships and corporations. *See* ERISA section 4022(b)(5)(A) (defining "substantial owner"). Title IV limits the amount of benefits that the PBGC guarantees to "substantial owners" who participate in single employer plans, but nonetheless provides a basic guarantee of such owners' pension benefits. Such a guarantee would be meaningless if Title I did not permit such owners to be participants in ERISA-covered pension plans.

In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner-employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the

limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992).[6]

Therefore, it is the view of the Department that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan, including the NEBF, from extending plan coverage to "working owners," as described in your submission, where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provisions of Title I.[7]

---

[6] In *Darden*, the United States Supreme Court held that the definition of "employee" provided in section 3(6) of Title I did not include an individual who was an independent contractor to the employer that established and maintained the plan. In reaching this conclusion, the Court first sought to determine whether ERISA contained any provision "either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.* at 323. Finding no guidance in the statute itself, the Court concluded that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 503 U.S. at 322. We follow here the Court's analysis in *Darden*, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat "working owners" as "participants."

[7] In its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "[a]n individual and his or her spouse . . . with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3(3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation.

ERISA's fiduciary standards, however, require compliance with any other applicable federal law. Pursuant to ERISA section 514(d), nothing in Title I of ERISA shall be construed to alter, amend, modify, invalidate, impair, or supersede any federal law or any rule or regulation issued pursuant to such federal law. Such federal laws include any requirements applicable to multiemployer benefit plans under the Labor Management Relations Act (LMRA). Several federal courts interpreting the LMRA have upheld decisions by plan trustees to exclude owner-employees on the ground that their inclusion would violate the LMRA. *See, e.g., Todd* v. *Benal Concrete Const. Co., Inc.*, 710 F.2d 581 (9th Cir. 1983); *Aitken* v. *GCU-Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979). The Department is not authorized to issue opinions regarding the LMRA. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" should seek legal advice regarding the propriety of the participation of "working owners" in such plans under the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Susan G. Lahne
Acting Chief
Division of Fiduciary
Interpretations
Office of Regulations and
Interpretations

AUG 1 1 2003
OFFICE OF THE CLERK

No. 02-458

In the

Supreme Court of the United States

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

James A. Holifield, Jr.
Counsel of Record
KENNERLY, MONTGOMERY
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Fourth Floor
Bank of America Center
Knoxville, TN 37902
(865) 546-7311
Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

PETITION FOR WRIT FILED SEPTEMBER 18, 2002
CERTIORARI GRANTED JUNE 27, 2003

(Any footnotes trail the end of each document)

Case No. 96-34511

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION,
AT KNOXVILLE

Adversary Pro. No. 98-3088
Chapter 7

IN RE
RAYMOND B. YATES,
Debtor;

WILLIAM T. HENDON, TRUSTEE
Plaintiff,

VS.

RAYMOND B. YATES, MD PC
PROFIT SHARING PLAN,
RAYMOND B. YATES, and/or
QUICK & REILLY, Plan
Administrator/Plan Trustee
Defendants.

COMPLAINT

COMES NOW the Plaintiff, William T. Hendon, the trustee herein (the "trustee"), by and through counsel, and alleges:

1. This proceeding relates to the above entitled case of Raymond B. Yates, "Debtor" - Case No. 96-34511, which is pending in this Court, the United States

Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville.

2. The Plaintiff is the duly appointed, qualified, and acting trustee in the case.

3. An involuntary petition under Chapter 7, Title 11, United States Code, was filed against the Debtor on December 2, 1996, and the order for relief was entered on February 27, 1997.

4. The first meeting of creditors was held in the case on May 13, 1997.

5. This adversary proceeding is brought pursuant to Bankruptcy Rule 7001 and Sections 547(b) and 550 of Title 11, United States Code. This is a core proceeding under 28 U.S.C. § 157(F). Jurisdiction is further based upon 28 U.S.C. § 1334(a).

6. The Defendant, Raymond B. Yates, MD PC Profit Sharing Plan, upon information and belief, may have been a qualified pension plan pursuant to the Internal Revenue Code. The current status of such Defendant is unknown. The Defendants, Raymond B. Yates and/or Quick & Reilly are, upon information and belief, the Plan Administrators/Trustees.

7. Prior to November of 1996, the Debtor incurred various loans from the Defendant, Raymond B. Yates, MD PC Profit Sharing Plan. Within ninety days prior to the commencement of this case, on November 12 and 13, 1996, the Debtor transferred to the "Raymond Yates MD PC Profit Sharing Plan," for and on account of an antecedent debt, the sum of $50,467.46, for the sole benefit of the Debtor. At the time of the transfer, the Debtor was insolvent and the effect of the transfer

enables the Defendant Plan to obtain more than it would receive under Chapter 7, Title 11, United States Code, if the transfer had not been made, and the Defendant received payment of such debt to the extent provided by Title 11 of the United States Code.

8. The trustee, through his counsel, made demand upon the Defendant for the return of the transfer by letter dated June 18, 1997.

WHEREFORE, the trustee prays that this Court make its order avoiding the aforesaid preferential transfer by the Debtor to the Defendant in the amount of $50,467.46 and ordering the Defendant to pay over to the trustee the sum of $50,467.46, plus legal interest from June 18, 1997, together with costs incurred herein, and for such other and further relief as this Court deems just and proper.

DATED: August 4, 1998.

C. MARK TROUTMAN Bar # 11712
Attorney or William T. Hendon, Trustee
McCORD, TROUTMAN & IRWIN, P.C.
Suite 1300, First Tennessee Plaza Knoxville,
Tennessee 37929
(423) 637-5252

Case No. 96-34511

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION,
AT KNOXVILLE

Adversary Pro. No. 98-3088
Chapter 7

IN RE
RAYMOND B. YATES,
Debtor;

WILLIAM T. HENDON, TRUSTEE
Plaintiff,

VS.

RAYMOND B. YATES, M.D.,
P.C. PROFIT SHARING PLAN
and RAYMOND B. YATES, PLAN TRUSTEE,
Defendants.

ANSWER

Come now the Defendants Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the "Plan") and Raymond B. Yates ("Yates"), in his capacity as Trustee of the Plan, by and through counsel, and file this answer to Plaintiff's Complaint as follows:

1. The Plan and Yates admit the allegations contained in Paragraph 1 of the Complaint.

2. The Plan and Yates are without sufficient knowledge to admit or deny the allegations contained in Paragraph 2 of the Complaint.

3. The Plan and Yates admit the allegations contained in Paragraph 3 of the
Complaint.

4. The Plan and Yates admit the allegations contained in Paragraph 4 of the Complaint.

5. The Plan and Yates admit the allegations contained in Paragraph 5 of the Complaint. Pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, the Plan and Yates specifically admit that this action is a core proceeding under 28 U.S.C. §157(F).

6. The Plan admits that it is a qualified plan pursuant to the Internal Revenue Code. Yates admits that he is the trustee of the Plan. All other allegations contained in Paragraph 6 of the Complaint are denied.

7. Defendant Yates admits that he obtained loans from the Plan and that in November, 1996 he paid $50,467.46 to the Plan to pay off such loans. The Plan admits that it received payment of $50,467.46 from Yates. The Plan and Yates specifically deny that the payment of the funds by Yates to the Plan enabled the Plan, as a secured creditor, to obtain more than it would receive under Chapter 7, Title 11, United States Code. All other allegations contained in Paragraph 7 of the Complaint are denied.

8. Defendant Yates and the Plan admit that the trustee's counsel, Mark Troutman, demanded the return of the payment made by Yates to the Plan by letter to Defendant Quick & Reilly dated June 18, 1997.

9. Defendant Yates and the Plan deny all other allegations contained in the Complaint which have not been specifically denied herein.

AFFIRMATIVE DEFENSES

10. The funds sought by the Plaintiff are not part of Yates' bankruptcy estate, and therefore, are not subject to the avoidance power under 11 U.S.C. §547(b). The funds paid by Yates to the Plan represent a portion of Yates' interest in a qualified retirement plan and as such are excluded from his bankruptcy estate.

11. The payment by Yates to the Plan did not constitute a preference under 11 U.S.C. §547(b) because it did not enable the Plan, as a secured creditor, to receive more than it would under Chapter 7, Title 11, United States Code.

12. The return of the funds paid by Yates to the Plan as requested by Plaintiff would be in direct violation of the disbursement provisions of the Plan. Yates, as trustee of the Plan, has no authority to disburse funds from the Plan other than to a plan participant who meets certain eligibility requirements or pursuant to a qualified domestic relations order.

13. The Defendant Plan's assets are ex· mpt pursuant to T.C.A. § 26-2-104.

WHEREFORE, the Yates and the Plan pray that this Court dismiss the Complaint and award the Plan and Yates all costs incurred herein and such other and further relief as this Court deems just and proper.

Respectfully submitted this 7th day of October, 1998.

KENNERLY, MONTGOMERY & FINLEY, P.C.
By: James A. Holifield, Jr., BPR 015494
Attorney for Raymond B. Yates, M.D. P.C.
Profit Sharing Plan and Raymond B. Yates,
Trustee
P.O. Box 442
Knoxville, Tennessee 37901
(423) 546-7311

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer was mailed by first class mail, postage prepaid, to:

C. Mark Troutman, Esq..
McCord, Troutman & Irwin, P.C.
Suite 1300, First Tennessee Plaza
Knoxville, Tennessee 37901
Attorney for Plaintiff

This the 7th day of October, 1998.

KENNERLY, MONTGOMERY & FINLEY, P.C.
By: James A. Holifield, Jr. Esq. #015494
4th Floor, 550 Main Street
NationsBank Center
P. O. Box 442
Knoxville, Tennessee 37901
(423) 546-7311 - voice
(423) 524-1773 - facsimile

Exhibit 1

N. David Roberts, Jr. 012230
BAILEY, ROBERTO & BAILEY,
P.L.L.C.
P. O. BOX 2189
KNOXVILLE, TN 37901
(423) 546-3533
Attorney for the Petitioner

UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

In re Raymond B. Yates Debtor	Case No.: 96-34511 Statement of Financial Affairs
Social Security No.: 435-54-3504	Chapter 7

1. Income from employment or operation of business.

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year.

This year: 1996 Source:	Amount:	0.00
Last year: 1995 Source: 24,500 wages	Amount:	24,500.00
Previous year: 1994 Source: 222,610 Wages	Amount:	222,610.00

2. Income other than from employment or operation of business.

State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the two years immediately preceding the commencement of this case.

This year: 1996 Amount: 105,658.00
Source: Income from sale of house - Cap Gain 100,300.00 Taxation of carp. income deemed to debtor $ 1930 education benefits to daughter. $ 75 interest income; $3000 limited partnership distributions. Federal AGI 105,658.
Last year: 1995 Amount: 34,228.00
Source: IRA distributions $34,228
Previous year: 1994 Amount: 932.00
Source: Interest Income $932

3. Payments to creditors.
a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case.

See Schedule

b. List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditor who are or were insiders.

See Schedule

4. Suits, executions, garnishments, and attachments.

a. List all suits to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case.

Status: Lawsuit is pending.
Knox Co. Chancery Court Docket No. 124867-2

Status: Lawsuit is pending.
Hamblen Co. Chancery Court Docket No. 95-170

Status: Lawsuit vent to judgment.
Knox Co. Chancery Court Docket No. 96-130282

Status: Lawsuit vent to judgment.
Hamblen County Chancery Court Docket No. 95-231

NationsBank of Tennessee, N.A. vs. Raymond H. Yates, Knox Co. Chancery Court Docket No. 130282-3, Third National Bank of East Tennessee vs. Raymond Yates, Hamblen County Chancery Court Docket No. 95-231; First Tennessee Bank vs. Raymond B. Yates, Knox Co. Chancery Court Docket No. 124867-2, Hall XRay Company vs. Raymond B. Yates, et al., Hamblen Co. Chancery Court Docket No. 95-170.

b. Describe all property that has been attached, garnished, or seized under any legal or equitable process within one year immediately preceding the commencement of this case.

NONE

5. Repossessions, foreclosures, and returns.

List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller,

within one year immediately preceding the commencement of this case.

NONE

6. Assignments and receiverships.

a. Describe any assignment of property for the benefit of creditor made within 120 days immediately preceding the commencement of this case.

NONE

b. List all property which has been in the hands of a receiver or court-appointed official within one year immediately preceding the commencement of this case.

NONE

7. Gifts.

List all gifts or charitable contributions made within one year immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient.

NONE

8. Losses.

List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case.

NONE

9. Payments related to debt counseling or bankruptcy.

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within one year immediately preceding the commencement of this case.

BAILEY, ROBERTS & BAILEY, P. L. L. C.
P. O. BOY 2189
KNOXVILLE, TN 37901
(423) 546-3533

Filing fee: NONE
Attorney's fees:
Source was: See attorney fee disclosure statement
Date(s) of payment:

See attorney disclosure statement.

10. Other transfers.

List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor transferred either absolutely or as security within one year immediately preceding the commencement of this case.

See Schedule

11. Closed financial accounts.

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor

which were closed, sold, or otherwise transferred within one year immediately preceding the commencement of this case.

Ray Yates MDPC Corp Acct - Hank of East Tenn. Closed late 96
Personal Checking - First Tenn Hank, Morristown

12. Safe deposit boxes.

List each safe deposit box or other box or depository in which the debtor has or had securities, cash, or other valuables within one year immediately preceding the commencement of this case.

closed late 96 - Peoples Hank, Morristown - personal papers and used for cash safekeeping from time to time.

13. Setoffs.

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within 90 days preceding the commencement of this case.

NONE

14. Property held for another person.

List all property owned by another person that the debtor holds or controls.

NONE

15. Prior address of debtor.
If the debtor has moved within the two years immediately preceding the commencement of this case,

list all premises which the debtor occupied during that period and vacated prior to the commencement of this case.

Length of time at current residence:

Prior residences: NOV. 96
670 Heatherbrook Circle, Jefferson City, TN 37760

16. Nature, location, and name of business.

a. For individuals, list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole
proprietorship, or was a self-employed professional within the two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

100% shareholder Ray Yates MDPC Corp. inactive.

b. If the debtor is a partnership, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities, within the two years immediately preceding the commencement of this case.

N/A

c. If the debtor is a corporation, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting

securities, within the two years immediately preceding the commencement of this case.

N/A

17. Books, records, and financial statements.

a. List all bookkeepers and accountants who within the six years immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

N/A

b. List all firms or individuals who within the two years immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

N/A

c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor.

N/A

d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case by the debtor.

N/A

18. Inventories.

a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

N/A

b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

N/A

19. Current Partners, Officers, Directors, and Shareholders.

a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

N/A

b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting securities of the corporation.

N/A

20. Former partners, officers, directors, and shareholders.

a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

N/A

b. If the debtor is a corporation, list all officers or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.
Statement of Financial Affairs

3. Payments to Creditors:

Internal Revenue Service	11-12-96	$8,900.00
Union Planters Mortgage	11-12-96	$1,534.00
Raymond B. Yates MD PC Profit Sharing Plan	11-42-96	$38,000.00
Raymond B. Yates MD PC Profit Sharing Plan	11-13-96	$12,467.46
Internal Revenue Service	11-12-96	$19,000.00

10. Transfers of Property from 12-1-95 to 12-1-96

Sold home in Jefferson County by Contract Dated October 18, 1996
Deed transferred on November 12, 1996 In Warranty Deed Book 401
Page 462 Jefferson County, Register of Deeds
Property conveyed to James and Peggy Stockwell of Plantation, FL
Property sold subject to existing mortgage of Union Planters.

Cashed in Individual Retirement Accounts (IRA) in December, 1995 and used for living expenses during 1996. Approximate proceeds $ 34,000.00

Sold boat for $ 3,000 during July, 1996. Received $1,500 in July, 1996 and $1,500 in August, 1996. Proceeds used for living expenses.

Sold two vehicles under sale/lease-back to Executive Financial Services, Inc. August 16, 1996 1992 Ford Van; August 16, 1996 1972 Triumph TR 6

N/A

21. Withdrawals from a partnership or distributions by a corporation.

If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during one year immediately preceding the commencement of this case.

N/A

(The penalties for making a false statement or concealing property is a fine of up to $500,00.0 or imprisonment for up to 5 years or both.
- 18 U.S.C. secs. 152 and 3571.)

DECLARATION

I, Raymond B. Yates, named as the debtor in this case, declare under penalty of perjury that I have read the foregoing Statement of Financial Affairs, consisting of 7 sheets, and that it is true and correct to the best of my information and belief.

Signature: Raymond B. Yates
Date: 9 April 97

EXHIBIT 2

Case No. 96-34511
Chapter 7/Involuntary

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

IN RE: RAYMOND B. YATES, M.D.,
Debtor.

DEPOSITION OF RAYMOND B. YATES, M.D.

February 19, 1997

APPEARANCES:

FOR NATIONSBANK:
James A. McIntosh, Esq.
900 South Gay Street
Suite 2200
Knoxville, Tennessee 37902
(423) 549-7000

FOR THE DEBTOR:
N. David Roberts, Jr., Esq.
218 Court Square Building
600 Cumberland Avenue
Knoxville, Tennessee 37902
(423) 546-3533

WITNESS:
Raymond B. Yates, M.D.
2141 Pine Mead Road
Knoxville, Tennessee 37920
(423) 694-0964

Q. How funds are invested?
A. Uh-huh.

Q. Do you get that statement monthly?
A. Yeah.

Q. I would like a copy of your statements on your retirement plan for the last 12 months.
A. I don't keep the last 12 months, but I will have the latest one or two probably. I mean, they are cumulative.

Q. Do you keep the rear end?
A. I just keep the last couple three months. I'm not good at paperwork. I don't keep a whole lot of back stuff. I mean, it is all - - it doesn't matter to me what they were worth a year ago. It matters to me what it is worth recently.

Q. When did you borrow the money from your retirement plan?
A. At different times. I think one of them was '82 or '83 and one was like '86 or '87. I think this last one was around '87.

Q. That is the $50,000 that you paid back when you sold your house?
A. Right.

Q. So that loan had been outstanding since '87?
A. Well, I mean, I have been paying it. Yeah, some of it.

Q. You have been making monthly payments?
A. No, I hadn't paid on it in quite a while. I didn't make regular payments on it, but it's about '87, '86 or '87.

Q. Until you sold your house and took the equity from your house and paid on your loans from your retirement plan, when is the next previous time that you had made a payment on that loan?
A. It's been a long time, since -- I haven't made one since I quit work. I don't know.

Q. Since March of '95?
A. Right.

Q. So when can you have me a copy of the statements that you have in your possession from your retirement plan?
A. The same time. If I have them, they will be around with these other ones.

Q. Those are provided to you by ERISA Services, correct?
A. No, actually it is Quick & Riley that have the money part of it.

Q. Quick & Riley, where are they located?
A. Across from the TVA building.

Q. Are they accountants?
A. No, it's like an investment -I'm not sure. Quick & Riley, like a small Merrill Lynch, I think.

THE WITNESS: Do you know?
MR. ROBERTS: A stockbroker company.

BY MR. McINTOSH:

Q. And that's where the investments are?
A. Uh-huh.

Q. The next one on your list is Robert Surber, S-u-r-b-e-r, storage cost, $1500. For how long have you owed him $1500?
A. It is $100 a month and the last time I paid him was in July of '95.

Q. Okay.

C E R T I F I C A T E

STATE OF TENNESSEE
COUNTY OF KNOX

I, James T. Rusk, Registered Professional Reporter and Notary Public, do hereby certify that I reported in machine shorthand the foregoing proceedings; that the foregoing pages, numbered 1 to 81, inclusive, were typed by me using computer-aided transcription and constitute a true and accurate record of said proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and official seal this the 19th day of February, 1997.

James T. Rusk
Registered Professional Reporter and Notary Public at Large.
My Commission Expires: 8-3-2000.

EXHIBIT 3

Civil Action No. 130282-3

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

NATIONSBANK OF TENNESSEE, N.A.
Plaintiff,

v.

RAYMOND B. YATES, Defendant.
APPEARANCES:

DEPOSITION OF RAYMOND B. YATES
November 13, 1996

FOR THE PLAINTIFFS:
James A. McIntosh, Esq.
2200 Riverview Tower
900 South Gay Street
P.O. Box 1792
Knoxville, Tennessee 37901

FOR THE DEFENDANT: Kevin Hardin, Esq.
Butler, Vines & Babb
First American Center,
Suite 810 P. O. Box 2649
Knoxville, TN 37901-2649

A. Oh, I got it probably just a few weeks ago. I can't remember.

Q. Well, Kevin told me that one of your parents died shortly. Was it your Mom or your Dad?

A. Mom.

Q. I'm sorry to hear that.
A. Okay, I appreciate that. Thank you.

Q. Uh, how much did you inherit? Total?
A. $19,400 and something.

Q. Is, how much of it is left remaining now?
A. Uh, I think it is that balance right there, $3,333 if I'm not mistaken.

Q. Alright, what, who did you pay the, uh, the other $16,000 to?
A. Living expenses and part of IRS and uh part of it to pay interest on a note.

Q. Which note?
A. Uh, its a retirement plan note that was in default.
Q. Uh, for your qualified profit sharing plan?
A. Yeah.

Q. How much interest was there?
A. On the note?

Q. Right.
A. I can't give you exact figures. It was uh kinda of an idea. About $23,000.

Q. So you didn't pay it off?
A. Uhm, not with that no. I paid it all but I didn't pay it with that.

Q. What was the source of the rest of the balance of the money?
A. The sale of my house.

Q. When did you sell your house?
A. Uhm, I would have to look and see. Just recently. Uh, October the 18.

Q. How much did you get out of the sale of your house?
A. $245,000.

Q. You sold the house for $245,000?
A. Right.

Q. Was there a mortgage on it?
A. Yes.

Q. How much was the mortgage?
A. About a $160,000.

Q. Who was it with?
A. Union Planters.

Q. And so that left uh, $85,000.00, am I right?
A. Yes.

Q. So you netted $85,000 after the sale?
A. No, I netted $70,000. Because there were real estate fees.
Q. Okay.
A. Of about $15,000.

Q. Where is that money now?
A. Well, a good bit of it, this, went to the IRS and the rest of it went to be paid at the retirement plan that was getting in default.

Q. How much did you owe the IRS?
A. Uh, $8.9 and $19, so that is $27.9.

Q. And then, how much did you pay to the retirement plan? $23?
A. No, uh that would be $50.246.

Q. So that is the total that you paid in your retirement plan? Was $50.246.
A. Yes.

Q. Okay.
A. That's principal and interest accrued over a long time.

Q. Alright. And that is the total of $77,000, $78,000, being paid to both the IRS and the retirement plan. So you paid all of the proceeds from the sale of your house and part of your inheritance to the IRS and back to your retirement plan?
A. Yes.

Q. Uh, and your retirement plan total, including the $50,000 that you paid back in is $87,000. Is that correct?
A. Uhm, it would be, there was $36 something in it, so that would be on top of the $50 that I put in there, so if that's what that comes out to be. I'll make sure. There was $36,000 in the plan.

Q. Right, that looks to be like a, correct. But this $87,000 includes the $50,000 that you put back in.
A. Yes.

Q. And you had a note, too?

Case No. 96-34511

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION,
AT KNOXVILLE

Adversary Pro. No. 98-3088
Chapter 7

IN RE
RAYMOND B. YATES,
Debtor;

WILLIAM T. HENDON, TRUSTEE
Plaintiff,

VS.

RAYMOND B. YATES, M.D.,
P.C. PROFIT SHARING PLAN
and RAYMOND B. YATES, PLAN TRUSTEE,
Defendants.

AFFIDAVIT OF RAYMOND B. YATES

I, Raymond B. Yates, M.D., hereby swear and affirm the following:

1. I, Raymond B. Yates, M.D., am over eighteen (18) years old and am competent to give this affidavit.

2. I reside at 2141 Pine Meade Road, Knoxville, Tennessee 37923.

3. I give this Affidavit in support of the Motion for Summary Judgment filed by the Plan and the Trustee of the Plan.

4. Raymond B. Yates, M.D., P.C., sponsors a qualified retirement plan known as the Raymond B. Yates, M.D., P.C. Profit Sharing Plan ("Plan"). A copy of the Adoption Agreement and Plan Document is attached as Exhibit A to this affidavit.

5. I am the Trustee of the Plan. See Exhibit A, Page 26.

6. The Plan is a qualified retirement plan. See Exhibit which is a copy of the IRS Determination Letter indicating that the Plan is a qualified plan pursuant to the Internal Revenue Code.

7. The Plan specifically provides that loans may be made to participants from the Plan. See Exhibit 1 of the Plan (attached as Exhibit A to this affidavit).

8. On December 13, 1989, I took a loan in the amount of Twenty Thousand Dollars ($20,000.00) from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan ("Money Purchase Plan"). The Money Purchase Plan was merged into the Raymond B.
Yates, M.D., P.C. Profit Sharing Plan on June 19, 1992. Therefore, this loan became a loan governed by the terms of Raymond B. Yates, M.D., P.C. Profit Sharing Plan as of June 19, 1992. This loan was repaid in November of 1996. The amount paid to the Plan was $50,467.46. At all times, the loan from the Plan was considered an asset of the Plan.

9. On December 2, 1996, an involuntary petition under Chapter 7, Title XI of the United States Code was filed against me.

10. I claimed my interest in the Plan as exempt property on Schedule B of my bankruptcy filing.

11. Attached as Exhibit to this Affidavit are true and accurate documents reflecting:

a. A loan from the Raymond B. Yates, M.D., Money Purchase Plan to me in the amount of Twenty Thousand Dollars ($20,000.00), including an irrevocable pledge and assignment and Participant Loan Application.

b. Trust accounting records for the Money Purchase Plan (1990-1992) and for the Profit Sharing Plan for the Plan years beginning July 1, 1989 to June 30, 1990; July 1, 1990 through June 30, 1991; July 1, 1991 through June 30, 1992; July 1, 1992 through June 30, 1993; July 1, 1993 through June 30, 1994; and July 1, 1994 through June 30, 1995.

Further Affiant saith not.

Raymond B. Yates

STATE OF Tennessee
COUNTY OF Knox

Sworn to and subscribed before me this 31st day of 1999.
Notary Public
My Commission Expires: 4/4/99

EXHIBIT A

QUALIFIED PLANS
PROTOTYPE DEFINED CONTRIBUTION PLAN AND TRUST
ADOPTION AGREEMENT #001
STANDARDIZED
PROFIT SHARING PLAN

RAYMOND B. YATES, M.D., P.C.
(Name of Employer)

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN
(Name of Plan)

Defined Contribution Basic Plan Document #01

ADOPTION AGREEMENT

The undersigned Employer by executing this Adoption Agreement hereby adopts the Qualified Plans Prototype Defined Contribution Plan and Trust of which this Adoption Agreement forms an integral part.

The undersigned Trustee by executing this Adoption Agreement hereby accepts the duties and responsibilities of this position with respect to the Prototype Plan.

Wherever the word "Plan" appears herein or in the Prototype Plan, it shall be deemed to mean the Prototype Plan as adopted by the Employer, together with all of the definitions and provisions applicable to it as elected herein.

Limitations with respect to provisions available to the Employer are set out in parentheses. Marked brackets (x) indicate the provisions which do apply to the Plan. Brackets left unmarked ( ) indicate the provisions which do not apply to the Plan. Failure to properly fill out the Adoption Agreement may result in disqualification of the Plan.

The Plan Sponsor will inform the Employer of any amendments made to the Prototype Plan or of the discontinuance or abandonment of the Prototype Plan.

Plan Name: RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN

Section 1. Plan Information

(a) The Employer hereby

( ) establishes the above named Plan

(X) amends, restates, and continues the above named Plan, which was originally effective on June 15, 1974,

( ) amends, restates, and continues the above named Plan, which was previously named theand which was originally effective on,

by adopting the QUALIFIED PLANS PROTOTYPE DEFINED CONTRIBUTION PLAN AND TRUST.

(b) The Effective Date of this Plan adoption or amendment shall be July 01, 1989.

(c) The Limitation Year shall be

( ) a calendar year ending on each December 31.

(X) the twelve (12) consecutive month period ending on JUNE 30, 1990.

If the Employer elects a year other than the calendar year, such period must be the same for all qualified plans of the Employer. If the Limitation Year is amended to a different twelve (12) consecutive month period, the new Limitation Year must begin on a date within the Limitation Year in which the amendment is made.

(d) The Plan Year shall be

(X) the twelve (12) consecutive month period which coincides with the Limitation Year.

( ) the twelve (12) consecutive month period commencing on and each anniversary thereof.

If the first Plan Year is a short Plan Year (less than twelve (12) consecutive months), the first day of the short Plan Year shall be.

(e) Three-digit number assigned to the Plan: 001 (f) This Plan

( ) is not a Paired Plan.

(X) is a Paired Plan.

This Plan is paired
with Adoption Agreement #: (X) 003 or ( ) 005

Section 2. Employer Information

Name: RAYMOND B. YATES, M.D., P.C.

Business address: P. O. BOX 1067
MORRISTOWN, TN 37814

Telephone number: (615) 587-9729

Date of incorporation or commencement of business: July 01, 1983

Federal tax identification number: 62-0893923
Employer's fiscal year end: June 30, 1990

Type of entity:
(X) Corporation

( ) Subchapter S Corporation
( ) Sole Proprietorship ( ) Partnership
( ) Tax Exempt Organization
( ) Professional Corporation
( ) Professional Association

The Employer contributes to the following additional pension or profit-sharing plans:

RAYMOND B. YATES, M.D., P.C. MONEY PURCHASE PENSION PLAN

Prior Trustee, if applicable: RAYMOND B. YATES

Section 3. Plan Administration

(a) The Trustee shall be:

( ) General Trust Company

(X) Name: RAYMOND B. YATES

Address: P.O. BOX 1067
MORRISTOWN, TN 37814

( ) Name:
Address:

(b) The Plan Administrator shall be:

(X) The Employer, ATTN: RAYMOND B. YATES

Telephone Number: (615) 587-9729

( ) Other: (specify)
Address:

Telephone Number:

Section 4. Employee Classes Excluded

The following class(es) of individuals employed by the Employer shall not be eligible to participate in the Plan:

(X) no exclusions.

( ) employees included in a unit of employees covered by a collective bargaining agreement between the Employer and Employee representatives, if retirement benefits were the subject of good faith bargaining. For this purpose, the term "Employee representatives" does not include any organization more than half of whose members are employees who are owners, officers or executives of the Employer.

( ) employees who are nonresident aliens and who receeive no earned income from the Employer which constitutes income from sources within the United States.

Section 5. Eligibility

(a) Each Employee who is employed on the Effective Date of the Plan shall be eligible to participate in the Plan upon meeting the following eligibility requirements:

(X) attained the age of 21 (cannot exceed 21).

(X) completed 1 Year(s) of Service (cannot exceed one (1) Year unless the Plan provides a nonforfeitable right to one hundred percent (100%) of the Participant's Account balance derived from

Employer Contributions after not more than two (2) Years of service in which case up to two (2) Years is permissible. In addition, if the Employer adopts the CODA permitting Elective Deferrals under the Plan, the minimum number of Years of Service required for participation in the CODA cannot exceed one (1). If the Year(s) of Service selected is or includes a fractional Year, an Employee will not be required to complete any specified number of Hours of Service to receive credit for such fractional Year.)

If this is a continuation of a Predecessor Plan, no Employee who has been a Participant under the Predecessor Plan and who is otherwise eligible to participate in this Plan shall be excluded from participation because of failure to satisfy the above age and Service requirements.

(b) Each Employee who is first employed after the Effective Date of the Plan shall be eligible to participate in the Plan upon meeting the following eligibility requirements:

(X) attained the age of 21 (cannot exceed 21).

(X) completed 1 Year(s) of Service (cannot exceed one (1) Year unless the Plan provides a nonforfeitable right to one hundred percent (100%) of the Participant's Account balance derived from Employer Contributions after not more than two (2) Years of Service in which case up to two (2) Years is permissible. In addition, if the Employer adopts the CODA permitting Elective Deferrals under the Plan, the minimum number of Years of Service required for participation in the CODA cannot exceed one (1). If the Year(s) of Service selected is or includes a fractional Year, an Employee will not be required to

complete any specified number of Hours of Service to receive credit for such fractional Year.)

(Note: The selection of eligibility requirements in subsections (a) and (b) cannot discriminate in favor of Highly Compensated Employees.)

(c) The initial Eligibility Computation Period shall be the twelve (12) consecutive month period beginning on the Employment Commencement Date. The succeeding twelve (12) consecutive month periods shall be as follows:

( ) The twelve (12) consecutive month period beginning on each anniversary of the Employee's Employment Commencement Date.
(X) Plan Years beginning with the Plan Year in which occurs the first anniversary of the Employee's Employment Commencement Date.

(d) The Plan Entry Date shall be as follows:

( ) The Employee's date of hire.

( ) The first day of the Plan Year in which the Employee meets the Plan's eligibility requirements.

( ) The first day of the Plan Year coincident with or immediately following the date the Employee meets the Plan's eligibility requirements (note: this option cannot be selected if the eligibility requirements stated in Sections 5(a) and (b) exceed age 20-1/2 and/or 1/2 Year of Service).

(X) The first day of the Plan Year or the date six (6) months after the first day of the Plan Year coincident with or immediately following the date

the Employee meets the Plan's eligibility requirements. If the first Plan Year is a short Plan Year (less than twelve (12) consecutive months), the Entry Date(s) for the short Plan Year shall be the first day of the short Plan Year (if the short Plan Year is six (6) consecutive months or less) OR the first day of the short Plan Year or the date six (6) months after the first day of the short Plan Year (if the short Plan Year is more than six (6) but less than twelve (12) consecutive months).

( ) The first day of the Plan Year or the date six (6) months after the first day of the Plan Year or the last day of the Plan Year coincident with or immediately following the date the Employee meets the Plan's eligibility requirements. If the first Plan Year is a short Plan Year (less than twelve (12) consecutive months), the Entry Date (s) for the short Plan Year shall be the first day of the short Plan Year or the last day of the short Plan Year (if the short Plan Year is six (6) consecutive months or less) OR the first day of the short Plan Year or the date six (6) months after the first day of the short Plan Year or the last day of the short Plan Year (if the short Plan Year is more than six (6) but less than twelve (12) consecutive months).

( ) The first day of the Plan Year nearest the date the Employee meets the Plan's eligibility requirements.

Section 6. Hours of Service

Service shall be determined on the basis of the method selected below. Only one method may be selected. The method selected shall be applied to all Employees covered under the Plan.

(X) On the basis of actual hours for which an Employee is paid or entitled to payment.

( ) On the basis of days worked. An Employee shall be credited with 10 Hours of Service per day if under Section 2.33 of the Plan such Employee would be credited with at least one (1) Hour of Service during the day.

( ) On the basis of weeks worked. An Employee shall be credited with forty-five (45) Hours of Service per week if under Section 2.33 of the Plan such Employee would be credited with at least one (1) Hour of Service during the week.

( ) On the basis of semi-monthly payroll periods. An Employee shall be credited with ninety-five (95) Hours of service per semi-monthly payroll period if under Section 2.33 of the Plan such Employee would be credited with at least one (1) Hour of service during the semimonthly payroll period.

( ) On the basis of months worked. An Employee shall be credited with one hundred ninety (190) Hours of Service per month if under Section 2.33 of the Plan such Employee
would be credited with at least one (1) Hour of Service during the month.

Section 7. Employer Contributions

(a) The Employer shall contribute an amount for each plan year as follows:

(X) a discretionary amount to be determined annually by the Board.

( ) % of each Participant's Compensation (maximum of 15%).

( ) % of profits in excess of $ 0.00.

(b) Such contribution

( ) shall

(X) shall not

come from, and be limited to, Net Profits or Accumulated Net Profits.

(c) (Note: The following selections are optional.) Net Profits shall be defined as the amount of net income of the Employer

( ) determined before contributions to this Plan in accordance with accounting practices normally utilized by the Employer

( ) determined before contributions to this Plan in accordance with accounting practices normally utilized by the Employer and before adjustments for

( ) dividends

( ) state income taxes

( ) federal income taxes

( ) excise taxes

excluding, however,

( ) gains or losses on the sale of capital assets

( ) income or losses from the sale of marketable securities

( ) dividends from shares of publicly owned companies

( ) net proceeds of any life insurance policies held by the Employer

Section 8. Allocation of Employer Contributions and Forfeitures

(a) Active Participants.

(i) For Plan Years beginning before January 1, 1990, each Participant shall be eligible to share in Employer Contributions and Forfeitures for the Plan Year upon meeting the following requirements (note: choose one or both):

(X) employed by the Employer on the last day of the Plan Year.

(X) completed at least 1,000 Hours of Service during the Plan Year.

(ii) For Plan Years beginning on or after January 1, 1990, each Participant shall be eligible to share in Employer Contributions and Forfeitures for the Plan Year, excluding, however (note: this selection is optional):

(X) Participants who terminate employment during the Plan Year with not more than 500 Hours of Service and who are not Employees as of the last day of the Plan Year.

(b) Allocation of Employer Contributions and Forfeitures. Employer Contributions and Forfeitures

shall be allocated as follows (note: choose only one method):

(X) NON-INTEGRATED

Employer Contributions and Forfeitures shall be allocated to each eligible Participant in the ratio that such Participant's Compensation bears to the Compensation of all Participants. (Note: The additional participation requirements of Section 13.02(a) of the Plan must be met unless the Employer maintains a money Purchase or Target Benefit Pension Plan and makes the minimum Top-Heavy allocations to such Plan.)

( ) INTEGRATED

The integration level is equal to:

( ) taxable wage base (the taxable wage base is the maximum amount of earnings which may be considered wages for a Year under Section 3121(a)(1) of the Code in effect as of the beginning of the Plan Year).

( ) $ 0.00 (a dollar amount less than the taxable wage base).

( ) % of the taxable wage base (not to exceed 100%).

Employer Contributions for the Plan Year plus any Forfeitures will be allocated to eligible Participants' Accounts as follows:

STEP ONE: Employer Contributions and Forfeitures will be allocated to each eligible Participant's Account in the ratio that each Participant's total Compensation bears to

all Participant's total Compensation, but not in excess of 3% of each Participant's Compensation.

STEP TWO: Any Employer Contributions and Forfeitures remaining after the allocation in Step One will be allocated to each eligible Participant's Account in the ratio that each Participant's Compensation for the Plan Year in excess of the integration level bears to the excess compensation of all Participants, but not in excess of 3%.

STEP THREE: Any Employer Contributions and Forfeitures remaining after the allocation in Step Two will be allocated to each Participant's Account in the ratio that the sum of each Participant's total Compensation and Compensation in excess of the integration level bears to the sum of all Participants' total Compensation and Compensation in excess of the integration level, but not in excess of the maximum profit-sharing disparity rate.

If the integration level is equal to the taxable wage base, the maximum profit-sharing disparity rate is equal to 2.7%.

If the integration level is not equal to the taxable wage base, the maximum profit-sharing disparity rate is equal to the percentage determined in accordance with the table below:

If the integration level: Is more than	But not more than	The applicable percentage is:
$0	X*	2.7%
X* of TWB	80% of TWB	1.3%
80% of TWB	Y**	2.4%

*X = the greater of $10,000 or 20 percent of the TWB
**Y = any amount more than 80% of the TWB but less than 100%, of the TWB.

STEP FOUR: Any remaining Employer Contributions or Forfeitures will be allocated to each Participant's Account in the ratio that each Participant's total Compensation for the Plan Year bears to all Participants' total Compensation for that Year.

If an Employee's entry date for participation in the Plan is not the first day of the Plan Year, then the integration level

( ) shall

( ) shall not

be prorated in the Plan Year in which the. Participant enters or reenters the Plan in the ratio that the length of the Participant's participation in the Plan that Plan Year bears to the length of that entire Plan Year.

(c) Terminated Participants. (Note: These selections are optional.) Participants who do not meet the requirements of (a) during the Plan Year shall not share in Employer Contributions and Forfeitures for such Plan Year except as provided below:

(i) For Plan Years beginning before January l, 1990,

( ) if, in (a)(i), the Employer selected the first option only, then a Participant who terminates employment during the Plan Year on account of (choose as many as apply)

( ) death

( ) disability

( ) or retirement

shall be entitled to share in the Employer Contributions and Forfeitures.

(X) if, in (a)(i), the Employer selected both options then a Participant who completes 1,000 Hours of service during the Plan Year but who terminates employment during the Plan Year on account of

(X) death

(X) disability

(X) or retirement

shall be entitled to share in the Employer Contributions and Forfeitures.

( ) if, in (a)(i), the Employer selected both options or the second option only then a Participant who terminates employment during the Plan Year on account of
( ) death

( ) disability

( ) retirement

and who does not complete. 1,000 Hours of Service during the Plan Year shall be entitled to share in the Employer Contributions and Forfeitures.

(ii) For Plan Years beginning on or after January 1, 1990, if the Employer selected the exclusion option under (a)(ii), such excluded Participants who terminate employment on account of

(X) death

(X) disability

(X) or retirement

and who do not complete 500 Hours of Service during the Plan Year shall be entitled to share in the Employer Contributions and Forfeitures.

(d) Disabled Participants. The Employer may elect to make non-forfeitable contributions on behalf of Non-highly Compensated Employees who become disabled. Such contributions will be made on the basis of the compensation each such Participant would have received for the Limitation Year if the Participant had been paid at the rate of compensation paid immediately before becoming totally disabled.
The Employer

( ) will

(X) will not

make contributions on behalf of disabled Participants.

Section 9. Compensation; Special Definitions

Compensation shall mean all of each Participant's

(X) W-2 earnings

( ) compensation (as that term is defined in section 415(c)(3) of the Code)

which is actually paid to the Participant during ( ) the Plan Year.

( ) the taxable year ending with or within the Plan Year.

( ) the Limitation Year ending with or within the Plan Year.

(X) the period during the Plan Year the Employee is a Participant in the Plan.

Compensation

( ) shall not include

(X) shall include

Employer Contributions made pursuant to a Salary Reduction Agreement which are not includable in the gross income of the Employee under Section 125, 402(a)(8), 402(h) or 403(b) of the Code.

Section 10. Employee Contribution

(a) Voluntary Contributions (non-deductible), unless elected in the CODA Adoption Agreement, are not permitted for Plan Years beginning after the Plan Year in which the Plan is adopted.

(b) Deductible Contributions are not permitted for Plan Years beginning after 1986.

(c) Rollover Contributions

( ) shall be permitted.

(X) shall be permitted only for those Employees who have met the eligibility requirements set forth in Section 5.

( ) shall not be permitted.

(d) Trustee-to-Trustee Transfers

( ) shall be permitted.

The Plan

( ) shall

( ) shall not

accept the transfer of assets from a defined benefit plan or money purchase pension plan (including a target benefit plan), or from a stock bonus or profit-sharing plan which would otherwise provide for a life annuity form of payment to the Participant.
(X) shall be permitted only for those Employees who have met the eligibility requirements set forth in Section 5.

The Plan

( ) shall

(X) shall not

accept the transfer of assets from a defined benefit plan or money purchase pension plan (including a target benefit plan), or from a stock bonus or profit-

sharing plan which would otherwise provide for a life annuity form of payment to the Participant.

( ) shall not be permitted.

Section 11. Vesting Schedule,

(a) The nonforfeitable interest of each Employee in his or her Employer Contributions Account balance shall be determined on the basis of the following (note: if, under Section 5(a) of this Adoption Agreement, more than one (1) Year of Service is required, "Nonforfeitable when made" must be checked):

( ) Nonforfeitable when made.

( ) 100% vesting after (not to exceed 5) Years of vesting service.

(X) 0% vesting after 1 Year.of Vesting Service.

50% vesting after 2 Years of Vesting Service.

100% (not less than 20) vesting after 3 Years of Vesting Service.

100% (not less than 40) vesting after 4 Years of Vesting Service.

100% (not less than 60) vesting after 5 Years of Vesting Service.

100% (not less than 80) vesting after 6 Years of Vesting Service.

100% vesting after 7 Years of Vesting Service.

(b) For vesting purposes, a Year of Service will be measured by

(X) the Plan Year.

( ) the twelve (12) consecutive month period commencing on the Employee's Employment Commencement Date and each subsequent twelve (12) consecutive month period commencing on the anniversary of such date.

Section 12. Restrictions on Years of Vesting Service

All of an Employee's Years of Service with the Employer are counted to determine the nonforfeitable percentage in the Employee's Account balance derived from Employer Contributions except:

( ) Years of Service before age 18;

( ) Years of Service during a period for which the Employee made no mandatory contributions under a predecessor plan;

( ) Years of Service before the Employer maintained this Plan;

( ) Years of Service before the Employer maintained this Plan or a predecessor plan;

( ) Years of Service before January 1, 1971, unless the Employee has had at least three (3) Years of Service after December 31, 1970;

( ) Years of Service before the effective date of ERISA if such Service would have been disregarded under the break in service rules of the prior plan in effect from

time to time before such date. For this purpose, break in service rules are rules which result in the loss of prior vesting or benefit accruals, or which deny an Employee eligibility to participate, by reason of separation or failure to complete a required period of service within a specific period of time.

Section 13. Retirement Ages

(a) Normal Retirement. For each Participant, Normal Retirement Age shall be

(X) age 65 (not to exceed 65) years.

( ) the later of age (not to exceed 65) years or the (not to exceed 5th) anniversary of the first day of the first Plan Year in which the Participant commenced participation in the Plan.

(b) Early Retirement.

( ) Not applicable.

(X) The Early Retirement Age for each Participant shall be

( ) age years.

(X) the later of age 55 years and/or the date he is credited with 10 Years of Service.

(c) Disability. (Note: This selection is optional.) For purposes of the Plan, Disability shall not include a physical or mental condition which results directly or indirectly from

( ) injury intentionally self-inflicted,

( ) injury, or disease resulting from military service, or

( ) injury or disease suffered or contracted prior to the Employee's Employment Commencement Date.

(d) Payment of Benefits. Benefits under ARTICLE 10 of the Plan due a Participant upon Termination of Employment for a reason other than death, Disability or Normal or Early Retirement shall be paid to the terminated Participant or applied for his benefit from his Account(s) as follows (note: select only one):

(X) within 60 days following the close of the Plan Year in which the Participant's Termination of Employment occurs, or as soon as practicable thereafter.

( ) within 60 days following the close of the Plan Year during which the Participant incurs a one (1) year Break in Service, or as soon as practicable thereafter.

( ) within 60 days following the close of the Plan Year during which the terminated Participant attains what would have been his Normal Retirement Age.

( ) in a manner uniformly and non-discriminatorily established by the Administrator and not otherwise in contravention of Section 10.02 of the Plan.

Section 14. Participant Loans Participant loans

(X) shall be permitted (complete attached Exhibit 1).

( ) shall not be permitted.

Section 15. Withdrawals

(a) Employer Contributions (note: if the Plan is integrated with Social Security, withdrawals are not permitted)

(X) Withdrawals from a Participant's Employer Contributions Account shall not be permitted.

( ) Withdrawals of up to % (note: not more than 100%) of a Participant's vested interest in his Employer Contributions Account shall be permitted in accordance with Section 10.05 of the Plan.
(b) Employee Contributions

(Note: this section of the Adoption Agreement should be filled out only if the Plan permitted Employee Contributions for Plan Years beginning on or before the Effective Date.)

(X) Withdrawals from a Participant's Employee Contributions Account shall not be permitted.

( ) Withdrawals of up to % (note: not more than 100%) of a Participant's Employee Contributions Account may be permitted.

(c) Rollover Contributions

(Note: this section of the Adoption Agreement should be filled out only if Rollover contributions are a feature of this Plan.)

(X) Withdrawals from a Participant's Rollover Account shall not be permitted.

( ) Withdrawals of up to % (note: not more than 100%) of a Participant's Rollover Account may be permitted.

Section 16. Top-Heavy Plans

This section automatically applies only in Plan Years in which the Plan is Top-Heavy, but all options herein must be completed in case the Plan ever becomes Top-Heavy.

(a) Single Plan-Minimum Contributions and Allocations. Notwithstanding the provisions of Section 8, and before any contributions are allocated thereunder, minimum Employer Contributions shall be made and allocated pursuant to Section 13.02 of the Plan in a Plan Year in which the Plan is Top-Heavy.

(b) Minimum Vesting. Notwithstanding the provisions of Section 11, the vested interest of each Employee in his Employer Contributions Account in a Plan Year in which the Plan is Top Heavy shall be determined, pursuant to Section 13.03 of the Plan, on the basis of the following vesting schedule, unless an equal or a more rapid vesting schedule has been selected in Section 11:

( ) 100% vesting after (not to exceed 3) Years of Vesting Service.

(X) 0% vesting after 1 Year of Vesting Service.

50% (not less than 20) vesting after 2 Years of Vesting Service.

100% (not less than 40) vesting after 3 Years of Vesting Service.

100% (not less than 60) vesting after 4 Years of Vesting Service.

100% (not less than 80) vesting after 5 Years of Vesting Service.

100% vesting after 6 Years of Vesting Service.

If the vesting schedule under the Plan shifts in or out of the above schedule for any Plan Year because of the Plan's Top-Heavy status, such shift is an amendment to the vesting schedule and the election rule in Section 17.01(c) of the Plan applies.

(c) Multiple Plans-Minimum Contributions and Allocations. This subsection shall only apply if you sponsor another qualified retirement plan.

(i) Code Section 415(e) Buy-Backs. If another retirement plan is a qualified defined benefit plan, and if for a Plan Year the plans are Top-Heavy (but not Super Top Heavy), then the "Code Section 415(e) buy back" provisions, as defined in Section 13.04 of the Plan,

(X) shall be utilized, so that 125%

( ) shall not be utilized, so that 100%

of the dollar limitations set out in Section 5.07 of the Plan shall be used in computing the Defined Benefit Fraction and the Defined Contributions Fraction.

(ii) Minimum Accruals.

(X) Even if the Plan is not a Paired Plan, the Plan shall be considered to be subject to the Paired Plan minimum

allocation provisions of ARTICLE 14 of the Plan as if it were a Paired Plan.

( ) The following overriding provisions shall control instead of the Paired Plan provisions regarding minimum accruals:

(iii) No Duplicate Benefits. If another retirement plan is a qualified defined contribution plan which is to be treated as a Paired Plan, then the required minimum Employer Contributions and allocations shall be provided only under

( ) this Plan.

(X) the other qualified defined contribution plan.

(iv) Present Value. For purposes of establishing Present Value to compute the Top-Heavy Ratio for the Plan as set forth in Section 13.01(c) of the Plan, any benefit under a qualified defined benefit pension plan maintained by the Employer shall be discounted only for mortality and interest based on the following factors which, if a lump sum benefit is available, should be the factors used to compute a lump sum benefit:
Mortality Table:

( ) the UP-1984 Mortality Table

(X) as provided in the qualified defined benefit pension plan

( ) Other:

Interest Rate:

( ) the current rate specified for the purchase of immediate annuities by the Pension Benefit Guaranty Corporation

(X) as provided in the qualified defined benefit pension plan

( ) Other:

(v) Valuation Date. For purposes of computing the Top-Heavy Ratio, the Valuation Date shall be:

(X) The Limitation Year selected in Section 1(c).

( ) The twelve (12) consecutive month period ending on.

Section 17. Investments

(Note: Choose any one option or permitted combination of options.)

(a) Investment decisions with respect to the portion of the assets of the Plan indicated below shall be controlled as follows (note: all selections must total 100% of assets and shall be measured as of the execution date of this Adoption Agreement, or such other date as set by the Employer):

(X) 100% (not more than 100%) controlled by the Trustee in its sole discretion.

( ) % (not more than 100%)
controlled by an Investment Manager appointed by the Employer pursuant to the provisions of Section 16.04 of the Plan.

( ) % (not more than 100%) controlled by each Participant, with respect to his Accounts other than his Employer Contributions Account pursuant to the provisions of Section 5.08 of the Plan.

(b) ( ) Although the Trustee or an Investment Manager has been designated above to control a portion of the investments, notwithstanding the portion of investment control designated above, the Administrator may elect to permit each Participant to have the right, at the Participant's discretion, to control the investment of the vested amount of his Employer Contributions Account and the amount of his other Accounts.

(c) ( ) The Trustee may delegate its duty physically to hold and safeguard the assets of the Plan to the Sponsor as custodian.

(d) ( ) Investment by the Plan in Qualifying Employer Securities shall be permitted, provided the requirements of Sections 406, 407 and 408 of ERISA are met, to a maximum of _ % (note: not more than 100%) of ( ) that portion of the Trust Fund attributable to Employer Contributions and Forfeitures ( ) the value of the entire Trust Fund (note: election of this second option may require the registration of such securities with the Securities and Exchange Commission). With respect to the voting of such Qualifying Employer Securities, the following entity shall vote such shares (note: select only one):

( ) the Trustee.

( ) the Participant to whose Account the shares have been allocated.

( ) the Administrator or, if appointed, the Committee.

Section 18. Insured Death Benefit

(X) No life insurance shall be provided under the Plan.
( ) An additional death benefit may be provided through the purchase of life insurance policies at the election of a Participant in accordance with Section 8.02 of the Plan.

Section 19. Joint and Survivor Annuity

(a) Benefits under the Plan

(X) may

(X) may not

be paid in the form of an annuity involving life contingencies. (Note: Optional forms of benefit payment may not be eliminated.)

(b) If benefits may be paid in the form of an annuity, then the Qualified Joint and Survivor Annuity shall be an annuity with 50% of the annuity benefit continuing to a Participant's surviving Spouse at the Participant's death, unless a greater percentage is elected below:

( ) 75%

( ) 100%

Section 20. Limitation on Allocations

If you maintain or ever maintained another qualified plan (other than Paired Plan #003 or #005) in which any Participant in this Plan is (or was) a Participant or could

become a Participant, you must complete this Section. You must also complete this Section if you maintain a welfare benefit fund, as defined in Section 419(e) of the Code, or an individual medical account, as defined in Section 415(1)(2) of the Code, under which amounts are treated as Annual Additions with respect to any Participant in this Plan.

(a) (X) If the Participant is covered under another qualified defined contribution plan maintained by the Employer, other than a master or prototype plan (note: select only one option):

(X) The provisions of subsections (b) and (c) of Section 5.07 of the Plan will apply as if the other plan were a master or prototype plan.

( ) The amount of Annual Additions allocated to any Participant's Accounts under this Plan shall be limited to the Maximum Permissible Amount, and excess amounts will be properly reduced, as follows:

( ) This situation is not applicable.

(b) ( ) If the Participant is or has ever been a Participant in a defined benefit plan maintained by the Employer (note: select only one option):

( ) In any Limitation Year, the Annual Additions credited under this Plan to the Participant may not cause the sum of the Defined Benefit Fraction and Defined Contribution Fraction to exceed 1.0. If the Employer's contribution that would otherwise be made on the Participant's behalf during the Limitation Year would cause the 1.0 limitation to be exceeded, the rate of contribution under this Plan

will be reduced so that the sum of the fractions equals 1.0. If the 1.0 limitation is exceeded because of an Excess Amount, such Excess Amount will be reduced in accordance with subsection 5.07 (a) (iv) of the Plan.

( ) The amount of Annual Additions allocated to any Participant's Accounts under this Plan shall be limited to the Maximum Permissible Amount, and Excess Amounts will be properly reduced, as follows:

(X) This situation is not applicable.

(c) The Limitation Year is the following twelve (12) consecutive month period:

(X) The Limitation Year selected in section 1(c).

( ) The twelve (12) consecutive month period ending on

Section 21. service with Predecessor Employer

Employment with the following Predecessor Employer(s) shall be considered Service with the Employer for all purposes of the Plan. (Note: If the Employer is maintaining a tax-qualified plan of a Predecessor Employer, that Predecessor Employer must be listed; place an asterisk (*) after the name of any such Predecessor Employer.):

(X) There are no such predecessor employers.

( ) (1)

(2)

(3)

Section 22. Controlled Group Members

The following employers are Controlled Group Members:

(X) There are no such employers.

( ) (1)

(2)

(3)

Section 23. Controlled Group Members who are Adopting Employers

The following Controlled Group Members have adopted the Plan for which a single Trust Fund may be used for the investment of the Trust Fund:

(X) There are no such Employers.

( ) (1)

(2)

An Employer who has ever maintained or who later adopts any plan (including a Welfare Benefit Fund, as defined in Section 419(e) of the Code, which provides post-retirement medical benefits allocated to separate accounts for Key Employees as defined in Section 419A(d) (3) of the Code, or an individual medical account, as defined in Section 415(1)(2) of the Code) in addition to this Plan (other than Paired Plan #003 or #005) may not rely on an opinion letter issued by the

National Office of the Internal Revenue Service as evidence that this Plan is qualified under Section 401 of the Internal Revenue Code. If the Employer who adopts or maintains multiple plans wishes to obtain reliance that his or her Plan(s) are qualified, application for a determination letter should be made to the appropriate Key District Director of the Internal Revenue.

This Adoption Agreement may be used only in conjunction with Basic Plan document #01.

PLAN SPONSOR INFORMATION

Name and Address:
General Trust Company
Suite 101, 104 Woodmont Blvd.
Nashville, Tennessee 37205

Telephone Number: (615) 385-3288

IN WITNESS WHEREOF, the Employer and the undersigned Trustee(s) have caused this Adoption Agreement to be executed this 20th day of July, 1990.

THE EMPLOYER:
RAYMOND B. YATES, M. D., P. C.

THE TRUSTEE:
RAYMOND B. YATES
THE CUSTODIAN (only if Sponsor named custodian):

EXHIBIT 1

LOAN PROGRAM

(X) Check here and either adopt the Model Loan Program attached hereto or complete the provisions of this Exhibit below if loans are permitted under this Plan as elected by the Employer in Section 14 of the Adoption Agreement.

(X) The Model Loan Program attached shall apply.

( ) The provisions filled in below shall apply (attach separate sheet if necessary).
This Exhibit 1 shall be subject to the provisions of ARTICLE 12 of the Plan. If there is any conflict between the terms of this Exhibit 1 and ARTICLE 12 of the Plan, the Plan shall control.

Person(s) or position(s) authorized to administer the loan program: (specify)

Loan procedure:

Basis on which loan will be approved or denied:

Limitations (if any) on types and amounts of loans offered:

Procedure for determining reasonable rate of interest:

Types of collateral which may secure a loan:

Events constituting default and steps to be taken to preserve Plan assets in the event of such default:

MODEL LOAN PROGRAM

LOAN PROCEDURES

The administrators) of the loan program shall be the head of human resources and/or personnel (and those individuals to whom he or she may delegate this authority). The administrator shall keep loan applications and make them available to all plan participants during regular business hours. When a plan participant applies for a loan, the administrator of the loan program will contact two, or if possible three, local banks or lending institutions. The administrator shall obtain from those banks or lending institutions current prime rates based upon the same terms of the loan to be made from the plan. Consequently all such rates shall be obtained on a secured loan basis for a fixed amount of time at a fixed (i.e., not variable) rate. The administrator of the loan program shall then notify the plan participant of the rate to apply to his or her loan and determine if the participant wishes to continue his or her application for the loan. If the participant does not, the loan application will be so noted and retained in the files of the administrator. If the participant still wants to be considered for a loan, the administrator shall notify the participant of his or her approval or denial for a loan. Thereafter as soon as practicable, the loan shall be made to the plan participant if approved. No loan shall be made for a period beyond five years unless the loan is to purchase a principal residence. All loan repayments shall be made by payroll deduction at least quarterly. Each loan shall be evidenced by a note containing an acceleration upon default clause. The same loan note, varying only as to rate (as concurrently determined at the loan

application) and term of the loan, shall be used for all similarly situated plan participants.

BASIS ON WHICH LOAN WILL BE APPROVED OR DENIED

Loans generally will be approved except for the following:

1. Employees for whom there is a reasonable expectation that their work performance or past history with the company will result in their not being employed throughout the duration of their loan;

2. Employees who are seeking loans extending beyond their period of expected service because of retirement;

3. Former employees not actively at work with the employer so as to justify the payroll deduction repayment of the loan amount;

4. Seasonal or part-time employees who may reasonably be expected not to work a sufficient number of hours to seasonally repay a requested loan based on the required loan rate schedule;

5. Loans to any employee in excess of amounts permitted under the loan program.

LIMITATIONS ON TYPES AND AMOUNTS OF LOANS OFFERED

Loans generally will be offered for the following reasons:

1. Purchase or refurbishment of a home:

2. Payment of secondary or post-secondary education;

3. Purchase of a new or used car to be used for transportation to and from work or to transport children to school;

4. Medical expenses not paid for or reimbursed by the Medical Plan or Plans maintained by the employer;

5. For purposes of taking a regularly scheduled vacation.

6. To meet emergency liquidity requirements of the plan -participant.

The loan shall be limited to the lesser of (a) an amount equal to one-half of the participant's vested interest in his account balances as of the last valuation date or (b) $50,000.

SCHEDULE FOR DETERMINING REASONABLE RATE OF INTEREST

The administrator of the loan program shall check with not less than two and preferably three banks or lending institutions to determine what prevailing rates are being commercially offered in the geographic area concurrently with the loan application or the same term (i.e., duration) of the loan to be made from the plan. These rates shall be averaged and increased by one (1) percentage point (i.e., 100 basis points) to determine the rate to be paid by the plan participant. Further, this rate shall be charged to the participant during the term of his

or her loan. Interest rate shall be fixed during the term and will not fluctuate.

COLLATERAL WHICH MAY SECURE A LOAN

The only security acceptable to secure a loan is one-half of the vested account balance of an employee.

EVENTS CONSTITUTING DEFAULT AND STEPS TO BE TAKEN TO DEFER PLAN ASSETS IN EVENT OF SUCH A DEFAULT

In the event of default the amount of loan will accelerate and become immediately due and payable. The administrator of the loan program will send a written notice to the plan participant telling him or her that he or she has defaulted on their loan and that the full amount of the loan is now due and payable, with interest continuing to accrue at the original specified rate on all outstanding balances until the full amount due is paid. The offset to the account balance will occur at the time there has been a distributable event. Account balances shall also be credited with regular plan earnings or losses prior to distribution.

Department of the Treasury
Washington. DC 20224
Person to Contacts: Ms. Arrington
Telephone Number: (202) 566-4576
Refer Reply to: E:EP:Q:ICU
Date: 05/10/90

GENERAL TRUST CO
104 WOODMONT SUITE 190
NASHVILLE, TO 37205

Dear applicant:

In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

You must furnish a copy of this letter to each employer who adopts this plan. You are also required to send a copy of the approved form of the plan, any approved amendments and related documents to each key District Director of Internal Revenue Service in whose jurisdiction there are adopting employers.

Our opinion on the acceptability of the form of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a). An employer who adopts this plan will be considered to have a plan qualified under Code section 401(a) provided all the terms of the plan are followed, and the eligibility requirements and

contribution or benefit provisions are not more favorable for officers owners or highly compensated employees than for other employees. Except as stated below, the Key District Director will not issue a determination letter with regard to this plan.

Our opinion does not apply to the form of the plan for purposes of Code section 401(a)(16) if: (1) an employer ever maintained another qualified plan for one or more employees who are covered by this plan, other than a specified carried plan within the meaning of section 7 of Rev. Proc. 39-9, 1989-6 I.R.S. 14: or (2) after December 31, 1985, the employer maintains a welfare benefit fund defined in Code section 419(e), which provides postretirement medical benefits allocated to separate accounts for key employees as defined in Code section 419A(d)(3). In such situations the employer should request a determination as to whether the plan considered with all related qualified plans and, if appropriate welfare benefit funds, satisfies the requirements of Code section 40l(a)(16) as to limitations on benefits and contributions in Code section 415.

If you, the plan sponsor, have any questions concerning the IRS processing of this case please call the above telephone number. This number is only for use of the plan sponsor. Individual participants and/or adopting employers with questions concerning the plan should contact the plan sponsor. The plan's adoption agreement must include the sponsor's address and telephone number for inquiries by adopting employers.

If you write to the IRS regarding this plan, please provide your telephone number and the most convenient time for us to call in case we need more information. Whether you call or write, please refer to the Letter Serial Number and File Folder Number shown in the heading of this Letter.

You should keep this letter as a permanent record. Please notify us if you modify or discontinue sponsorship of this plan.

Sincerely yours,
Chief, Employee Plans Qualifications Branch

FIRST AMENDMENT TO THE

QUALIFIED PLANS

PROTOTYPE DEFINED CONTRIBUTION PLAN AND TRUST

BASIC DOCUMENT #01

WHEREAS, General Trust Company (Sponsor) established the Qualified Plans Prototype Defined Contribution Plan and Trust #01 (Prototype Plan), and the Adoption Agreements for such Prototype Plan having received favorable opinion letters from the Internal Revenue Service, dated as of May 10, 1990; and

WHEREAS, the Sponsor has been expressly delegated the authority by the adopting Employers of the Prototype Plan to amend the Prototype Plan as the Sponsor deems necessary or desirable; and

WHEREAS, the Internal Revenue Service, under Revenue Procedure 93-12, requires that the Prototype Plan be amended to comply with the Unemployment Compensation Amendments of 1992;

NOW, THEREFORE, the Prototype Plan is hereby amended as follows:

I.

Add to the end of the Prototype Plan new ARTICLE 19 to read as follows:

ARTICLE 19

DIRECT ROLLOVERS

19.01 Election of Direct Rollover.

This ARTICLE applies to distributions made on or after January 1, 1993. Notwithstanding "any provision of the Plan to the contrary that would otherwise limit a Distributee's election under this ARTICLE, a Distributee may elect, at the time and in the manner prescribed by the Administrator, to have any portion of an Eligible Rollover Distribution paid directly to an Eligible Retirement Plan specified by the Distributee in a Direct Rollover.

19.02 Definitions.

(a) Eligible Rollover Distribution: An Eligible Rollover Distribution is any distribution of all or any portion of the balance to the credit of the Distributee, except that an Eligible Rollover Distribution does not include:

(i) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the Distributee or the joint lives (or joint life expectancy) of the Distributee or the joint lives (or joint life expectancies) of the Distributee and the Distributee's Beneficiary, or for a specified period of ten years or more; or

(ii) any distribution to the extent such distribution is required under Section 401(a)(9) of the Code; and

(iii) the portion of any distribution that is not includible in gross income (determined without regard

to the exclusion for net unrealized appreciation with respect to Employer securities).

(b) Eligible Retirement Plan: An Eligible Retirement Plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in Section 408(b) of the Code, an annuity plan described in section 403(a) of the Code or a qualified trust described in Section 401(a) of the Code, that accepts the Distributee's Eligible Rollover Distribution. However, in the case of an Eligible Rollover Distribution to the surviving spouse, an Eligible Retirement Plan is an individual retirement account or individual retirement annuity.

(c) Distributee: A Distributee includes an Employee or former Employee. In addition, the Employee's or former Employee's surviving spouse and the Employee's or former Employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Section 414(p) of the Code, are Distributees with regard to the interest of the spouse or former spouse.

(d) Direct Rollover: A Direct Rollover is a payment by the Plan to the Eligible Retirement Plan specified by the Distributee.

II.

The effective date of this First Amendment shall be January 1, 1993.

III.

In all other respects, the Prototype Plan is ratified and confirmed.

SECOND AMENDMENT TO THE

QUALIFIED PLANS

PROTOTYPE DEFINED CONTRIBUTION PLAN AND TRUST

BASIC DOCUMENT #01

WHEREAS, Qualified Plans (Sponsor) established the Qualified Plans Prototype Defined Contribution Plan and Trust #01 (Prototype Plan), and the Adoption Agreements for such Prototype Plan having received favorable opinion letters from tile Internal Revenue Service, dated as of May 10, 1990; and

WHEREAS, the Sponsor has been expressly delegated the authority by tile adopting Employers of the Prototype Plan to amend tile Prototype Plan as tile Sponsor deems necessary or desirable; and

WHEREAS, the Internal Revenue Service, under Revenue Procedure 94-13, requires that the Prototype Plan be amended to comply with the Omnibus Budget Reconciliation Act of 1993 (OBRA '93);

NOW, THEREFORE, the Prototype Plan is hereby amended as follows:

I.

Add to the end of Section 2.13, entitled Compensation, to read as follows:

In addition to other applicable limitations set forth in the plan, and notwithstanding any other provision of the plan to the contrary, for plan years beginning on or

after January 1, 1994, the annual compensation of each employee taken into account under the plan shall not exceed the OBRA '93 annual compensation limit. The OBRA '93 annual compensation limit is $150,000, as adjusted by the Commissioner for increases in the cost of living in accordance with section 401(a)(17)(B) of the Internal Revenue Code. The cost-of-living adjustment in effect for a calendar year applies to any period, not exceeding 12 months, over which compensation is determined (determination period) beginning in such calendar year. If a determination period consists of fewer than 12 months, the OBRA '93 annual compensation limit will be multiplied by a fraction, the numerator of which is the number of months in the determination period, and the denominator of which is 12.

For plan years beginning on or after January 1, 1994, any reference in this plan to the limitation under section 401(a)(17) of the Code shall mean tile OBRA '93 annual compensation limit set forth in this provision.

If compensation for any prior determination period is taken into account in determining an employee's benefits accruing in the current plan year, the compensation for that prior determination period is subject to the OBRA '93 annual compensation limit in effect for that prior determination period. For this purpose, for determination periods beginning before the first day of the first plan year beginning on or after January 1, 1994, the OBRA '93 annual compensation limit is $150,000.

II.

The effective date of this Second Amendment shall be January 1, 1994.

III.

In all other respects, the Prototype Plan is ratified and confirmed.

Department of the Treasury
Washington. DC 20224
Person to Contacts: Ms. Arrington
Telephone Number: (202) 566-4576
Refer Reply to: E:EP:Q:ICU
Date: 05/10/90

GENERAL TRUST CO
104 WOODMONT SUITE 190
NASHVILLE, TO 37205

Dear applicant:

In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

You must furnish a copy of this letter to each employer who adopts this plan. You are also required to send a copy of the approved form of the plan, any approved amendments and related documents to each key District Director of Internal Revenue Service in whose jurisdiction there are adopting employers.

Our opinion on the acceptability of the form of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a). An employer who adopts this plan will be considered to have a plan qualified under Code section 401(a) provided all the terms of the plan are followed, and the eligibility requirements and

contribution or benefit provisions are not more favorable for officers owners or highly compensated employees than for other employees. Except as stated below, the Key District Director will not issue a determination letter with regard to this plan.

Our opinion does not apply to the form of the plan for purposes of Code section 401(a)(16) if: (1) an employer ever maintained another qualified plan for one or more employees who are covered by this plan, other than a specified carried plan within the meaning of section 7 of Rev. Proc. 39-9, 1989-6 I.R.S. 14: or (2) after December 31, 1985, the employer maintains a welfare benefit fund defined in Code section 419(e), which provides postretirement medical benefits allocated to separate accounts for key employees as defined in Code section 419A(d)(3). In such situations the employer should request a determination as to whether the plan considered with all related qualified plans and, if appropriate welfare benefit funds, satisfies the requirements of Code section 401(a)(16) as to limitations on benefits and contributions in Code section 415.

If you, the plan sponsor, have any questions concerning the IRS processing of this case please call the above telephone number. This number is only for use of the plan sponsor. Individual participants and/or adopting employers with questions concerning the plan should contact the plan sponsor. The plan's adoption agreement must include the sponsor's address and telephone number for inquiries by adopting employers.

If you write to the IRS regarding this plan, please provide your telephone number and the most convenient time for us to call in case we need more information. Whether you call or write, please refer to the Letter Serial Number and File Folder Number shown in the heading of this Letter.

You should keep this letter as a permanent record. Please notify us if you modify or discontinue sponsorship of this plan.

Sincerely yours,
Chief, Employee Plans Qualifications Branch

QUALIFIED PLANS

PROTOTYPE DEFINED CONTRIBUTION PLAN AND TRUST

General Trust Company hereby establishes this Prototype Plan and Trust for Employers wishing to establish or continue to profit sharing or money purchase pension plans.

An Employer may adopt this Prototype Plan as part of its Plan by completing and signing an Adoption Agreement, which adoption shall be effective when executed by the Trustee.

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ARTICLE 1

PURPOSE OF PLAN AND TRUST AND IMPLEMENTING PROVISIONS

1.01 Purpose.

The purpose of this Plan and Trust is to enable the Employer.to establish or continue a defined contribution plan for its employees.

1.02 Tax Aspects.

It is the intent of the Sponsor in establishing this Plan and Trust that it qualify and remain qualified under Sections 401(a) and 501(a) of the Internal Revenue Code of 1986, as amended. However, in the event that the Trust hereunder after once having been qualified, fails to retain qualification, the provisions of Section 17.06 hereof shall be applicable as of the date said Trust is no longer qualified.

1.03 Adoption Agreement.

For purposes of facilitating the creation of this Plan and Trust under procedures promulgated by the Internal Revenue Service for establishing a variable form master defined contribution plan and trust, the Adoption Agreement executed by the Employer and the Trustee is hereby made a part hereof by reference as if fully set forth herein, and the definitions and provisions thereof elected by the Employer shall be applicable to the Plan and Trust of the Employer.

ARTICLE 2

DEFINITIONS

Unless otherwise explicitly specified, the following words and phrases as used herein shall have the meanings set forth below and shall be interpreted as stated in this ARTICLE.

2.01 "Account or Accounts" shall mean a Participant's Employer Contributions Account, Voluntary Contributions Account, Deductible Contributions Account, Elective Deferral Account, Rollover Account, Trustee-to-Trustee Transfer Account and Participant-Directed Investment Account, as described in Section 5.01.

2.02 "Accumulated Net Profits" shall mean that part of the surplus of the Employer derived from Net Profits and retained from time to time by the Employer.

2.03 "Administrator" shall mean, with respect to the Plan, the party to which the Employer shall delegate its administrative duties and responsibilities in accordance with ARTICLE 15 of the Plan and Section 3 of the Adoption Agreement. If the Employer does not delegate its administrative duties and responsibilities, the Employer shall be the Administrator.

2.04 "Adoption Agreement" shall mean the instrument by which the Employer elects to establish or continue its Plan by adoption of this prototype plan document.

2.05 "Allocation Date" shall mean the last day of each Plan Year. The Employer may establish such other Allocation Dates during a Plan Year; provided, however, that the use of more than one Allocation Date during a

Plan Year shall not be applied so as to result in discrimination in favor of Employees who are officers, shareholders or highly compensated.

2.06 "Anniversary Date" shall mean the first day of a Plan Year.

2.07 "Beneficiary" shall mean the recipient or recipients last designated by the Participant in writing on forms provided by the Employer who shall receive any benefits payable under the Plan upon the death of such Participant, subject, however, to the requirements of ARTICLES 8 and 11. If no such designation of Beneficiary has been received by the Employer prior to the date of death of the Participant, then such benefit shall be payable to the estate of the Participant.

2.08 "Board" shall mean the board of directors of the Employer.

2.09 "Break in Service" shall mean a twelve (12) consecutive month period during which an Employee has not been credited with more than five hundred (500) Hours of Service. For eligibility purposes, the period shall mean the Eligibility Computation Period. For purposes of computing an Employee's nonforfeitable right to the Account balance derived from Employer Contributions, Breaks in Service will be measured by the twelve (12) consecutive month period designated by the Employer in Section 11(b) of the Adoption Agreement.

2.10 "CODA" shall mean a qualified cash or deferred arrangement as described in Section 401(k) of the Code, ARTICLE VI of the Plan, and Section 24 of the profit sharing plan Adoption Agreement.

2.11 "Code" shall mean the Internal Revenue Code of 1986, as amended.

2.12 "Committee" shall mean the committee to which the Employer may delegate its administrative duties and responsibilities in accordance with ARTICLE 15.

2.13 "Compensation" shall mean, as elected by the Employer in Section 9 of the Adoption Agreement, all of each Participant's (a) W-2 earnings or (b) compensation. as that term is defined in Section 415(c)(3) of the Code. For any Self-Employed Individual covered under the Plan, Compensation will mean Earned Income. Compensation shall include only that Compensation which is actually paid to the Participant during the applicable period. Except as provided elsewhere in this Plan, the applicable period shall be the period elected by the Employer in Section 9 of the Adoption Agreement. If the Employer makes no election, the applicable period shall be the Plan Year.

Notwithstanding the above, if elected by the Employer in the Adoption Agreement, Compensation shall include any amount which is contributed by the Employer pursuant to a salary reduction agreement which is not includible in the gross income of the Employee under Section 125, 402(a)(8), 402(h) or 403(b) of the Code.

The annual Compensation of each Participant taken into account under the Plan for any Year shall not exceed $200,000, as adjusted by the Secretary at the same time and in the same manner as under Section 415(d) of the Code. In determining the Compensation. of a Participant for purposes of this limitation, the rules of Section 414(q)(6) of the Code shall apply, except in applying such rules, the term "family" shall include only the Spouse of the Participant and any lineal descendants of

the Participant who have not attained age nineteen (19) before the close of the Year.

If, as a result of the application of such rules the adjusted $200,000 limitation is exceeded, then (except for purposes of determining the portion of Compensation up to the integration level if this Plan provides for permitted disparity), the limitation shall be prorated among the affected individuals in proportion to each such individual's Compensation as determined under this Section prior to the application of this limitation.

2.14 "Controlled Group Member" shall mean, except as modified in Section 5.07(f)(vi), as follows: (a) any corporation which is a member of a controlled group of corporations (as defined in Section 414(b) of the Code) of which the Employer is a member, (b) any organization which is a member of a group of trades or businesses (whether or not incorporated) which is under common control with respect to the Employer (as defined in Section 414(c) of the Code), (c) any organization which is a member of an affiliated service group (as defined by Section 414(m) of the Code), or (d) any other entity required to be aggregated with the Employer pursuant to Section 414(0) of the Code and the regulations thereunder; but only for the period during which such other corporation, trade or business, organization or entity and the Employer are members of such controlled group of corporations, are under such common control, are serving as such affiliated service group or are required to be aggregated. All employees of Controlled Group Members shall be treated as employed by a single employer.

2.15 "Disability" shall mean the inability to engage in any substantial gainful activity by reason of any

medically determinable physical or mental impairment that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months. The permanence and degree of such impairment shall be supported by medical evidence. If elected by the Employer in Section 8 of the Adoption Agreement, nonforfeitable contributions will be made to the Plan on behalf of each disabled Participant who is not a Highly Compensated Employee (within the meaning of Section 414(q) of the Code).

2.16 "Early Retirement Age" shall mean the age selected in Section 13(b) of the Adoption Agreement, at which time a Participant shall be entitled to receive an Early Retirement Benefit.

2.17 "Early Retirement Benefit" shall mean the benefit to which a Participant is entitled at his Early Retirement Date.

2.18 "Early Retirement Date" shall mean the date the Participant attains his Early Retirement Age and is fully vested pursuant to Section 9.01 of the Plan and Section 11 of the Adoption Agreement.

2.19 "Earned Income" shall mean the net earnings from self-employment in the trade or business with respect to which the Plan is established, for which personal services of the individual are a material income-producing factor. Net earnings shall be determined without regard to items not included in gross income and the deductions allocable to such items. Net earnings are reduced by contributions by the Employer to a qualified plan to the extent deductible under Section 404 of the Code. Net earnings shall be determined with regard to the deduction allowed to the

Employer by Section 164(f) of the Code for taxable years beginning after December 31, 1989.

2.20 "Effective Date" shall mean, as to the Employer, the Effective Date of the Plan as specified in Section 1(b) of the Adoption Agreement.

2.21 "Elective Deferrals" shall mean contributions made at the election of the Participant by the Employer pursuant to ARTICLE 6 of the Plan.

2.22 "Eligibility Computation Period" shall mean, for purposes of determining Years of Service and Breaks in Service for purposes of eligibility, the following:

(a) The initial Eligibility Computation Period is the twelve (12) consecutive month period beginning on the Employment Commencement Date.

(b) The succeeding twelve (12) consecutive month periods shall commence on one of the following dates, as elected by the Employer in Section 5 of the Adoption Agreement:

(i) The first anniversary of the Employee's Employment Commencement Date; or

(ii) The first Plan Year which commences prior-to the first anniversary of the Employee's Employment Commencement Date regardless of whether the Employee is entitled to be credited with one thousand (1,000) Hours of Service during the initial Eligibility Computation Period. An Employee who is credited with one thousand (1,000) Hours of Service in both the initial Eligibility Computation Period and the first Plan Year which commences prior to the first anniversary of the Employee's initial Eligibility Computation Period will be

credited with two (2) Years of Service for purposes of eligibility to participate.

Years of Service and Breaks in Service will be measured on the same Eligibility Computation Period.

2.23 "Employee" shall mean any employee of the Employer maintaining the Plan or of any other employer required to be aggregated with the Employer under Section 414(b), (c), (m) or (o) of the Code. The term Employee shall also include any Leased Employee deemed to be an employee of any employer described in the preceding sentence as provided in Section 414(n) or (o) of the Code. For purposes of this Section, Employee shall also include an Owner-Employee or Self-Employed Individual. An individual who is classified in one or more of the categories specifically excluded in Section 4 of the Adoption Agreement shall not be defined as an Employee for purposes of the Plan unless and until he ceases to be so classified; provided, however, that any such excluded individual shall be credited with Hours of Service hereunder during the period he is excluded for purposes of determining his Years of Vesting Service and the time of his participation in the Plan in the event he ceases to be so classified.

2.24 "Employee Contributions" shall mean contributions made by the Employee pursuant to Section 4.02 of the Plan and Section 10 of the Adoption Agreement.

2.25 "Employer" shall mean that business organization, its predecessors (if, and to the extent, Years of Service thereunder is to be included pursuant to Section 2.62 of the Plan and Section 12 of the Adoption Agreement), successors and/or assigns, which have duly executed an Adoption Agreement. The

Employer also includes any Controlled Group Member that adopts the Plan as provided in Section 23 of the Adoption Agreement.

2.26 "Employer Contributions" shall mean contributions made by the Employer pursuant to Section 4.01 of the Plan and Section 7 of the Adoption Agreement.

2.27 "Employment Commencement Date" shall mean the date on which an Employee first performs an Hour of Service.

2.28 "Entry Date" shall mean the date on which an Employee enters the Plan pursuant to Section 5(d) of the Adoption Agreement.

2.29 "ERISA" shall mean Public Law 93-406, popularly known as the Employee Retirement Income Security Act, as amended.

2.30 "Five-Percent Owner" shall mean any person who owns (or is considered as owning within the meaning of Section 318 of the Code) more than five (5) percent of the outstanding stock of a corporate Employer or stock possessing more than five (5) percent of the total combined voting power of all stock of the Employer or more than five (5) percent of the interest in the non-corporate Employer.

2.31 "Forfeiture" shall mean the non-vested portion of a Participant's Employer Contributions Account which is forfeited pursuant to Sections 5.04 and 9.02.

2.32 "Highly Compensated Employee" shall mean any Employee who performs Service for the Employer during the determination year and who, during the look-

back year: (a) received Compensation from the Employer in excess of $75,000 (as adjusted pursuant to Section 415(d) of the Code); (b) received Compensation from the Employer in excess of $50,000 (as adjusted pursuant to Section 415(d) of the Code) and was a member of the top-paid group for such year; or (c) was an officer of the Employer and received Compensation during such year that is greater than fifty (50) percent of the dollar limitation in effect under Section 415(b)(1)(A) of the Code. The term Highly Compensated Employee also includes: (i) Employees who are both described in the preceding sentence if the term "determination year" is substituted for the term "look-back year" and the Employee is one of the one hundred (100) Employees who received the most Compensation from the Employer during the determination year; and (ii) Employees who are Five-Percent Owners at any time during the look-back year or determination year.

If no officer has satisfied the Compensation requirement of (c) above during either a determination year or look-back year, the highest paid officer for such year shall be treated as a Highly Compensated Employee.

For this purpose, the determination year shall be the Plan Year. The look-back year shall be the twelve-month period immediately preceding the determination year.

A Highly Compensated Employee includes any Employee whose Termination of Employment occurred (or who was deemed to have incurred a Termination of Employment) prior to the determination year, performs no Service for the Employer during the determination year, and was a Highly Compensated active Employee for either the Termination year or any determination year ending on or after the Employee's 55th birthday.

If an Employee is, during a determination year or look-back year, a Family Member of either a Five-Percent Owner who is an active or former Employee or a Highly Compensated Employee who is one of the ten (10) most highly compensated Employees ranked on the basis of Compensation paid by the Employer during such year, then the Family Member and the Five-Percent Owner or top-ten Highly Compensated Employee shall be aggregated. In such case, the Family Member and Five-Percent Owner or top-ten Highly Compensated Employee shall be treated as a single Employee receiving Compensation and Plan contributions or benefits equal to the sum of such Compensation and contributions or benefits of the Family Member and Five-Percent Owner or top-ten Highly Compensated Employee. For purposes of "his Section, Family Member includes the Spouse, lineal ascendants and descendants of the Employee or former Employee and the spouses of such lineal ascendants and descendants.

The determination of who is a Highly Compensated Employee, including the determinations of the number and identity of Employees in the top-paid group, the top one hundred (100) Employees, the number of Employees treated as officers and the Compensation that is considered, will be made in accordance with Section 414(q) of the Code and the regulations thereunder.

2.33 "Hour of Service" shall mean the following:

(a) Each hour for which an Employee is paid, or entitled to payment, for the performance of duties for the Employer and/or a Controlled Group Member. These Hours will be credited to the Employee for the computation period in which the duties are performed.

(b) Each hour for which an Employee is paid, or entitled to payment, by the Employer and/or a Controlled Group Member on account of a period of time during which no duties were performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including Disability), layoff, jury duty, military duty or leave of absence. No more than five hundred one (501) Hours of Service shall be credited under this subsection (b) for any single continuous period (whether or not such period occurs in a single computation period). Hours under this subsection (b) will be calculated and credited pursuant to Section 2530.200b-2 of the Department of Labor Regulations which is incorporated herein by this reference.

(c) Each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the Employer. The same hours shall not be credited both under subsection (a) or (b) and under this subsection (c). These hours shall be credited to the Employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement or payment is made.

Hours of Service will be credited for employment with Controlled Group Members.

Hours of Service will also be credited for any individual considered an Employee for purposes of this Plan under Section 414(n) or (o) of the Code and the regulations thereunder.

Solely for purposes of determining whether a Break in Service for participation and vesting purposes has occurred in a computation period, an individual who` is

absent from work for maternity or paternity reasons or is on an authorized leave of absence (defined below) shall receive credit for the Hours of Service which would otherwise have been credited to such individual but for such absence, or in any case in which such hours cannot be determined, eight (8) Hours of Service per day of such absence. For purposes of this paragraph, an absence from work for maternity or paternity reasons means an absence (i) by reason of the pregnancy of the individual, (ii) by reason of a birth of a child of the individual, (iii) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or (iv) for purposes of caring for such child for a period beginning immediately following such birth or placement. An "authorized leave of absence" means any unpaid absence authorized by the Employer under the Employer's standard personnel practices, provided that all persons under similar circumstances must be treated alike in the granting of such Authorized Leaves of Absence. An absence due to service in the Armed Forces of the United States shall be considered an authorized leave of absence provided that the absence is caused by war or other emergency, or provided that the Employee is required to serve under the laws of conscription in time of peace. The Hours of Service credited under this paragraph for maternity or paternity reasons will be credited (1) in the computation period in which the absence begins if the crediting is necessary to prevent a Break in Service in that period, or (2) in all other cases, in the following computation period.

Hours of Service shall be determined on the basis of the method selected in Section 6 of the Adoption Agreement.

2.34 "Inactive Participant" shall mean a Participant (or former Participant who has a balance remaining in his Accounts) who is not entitled to share in the allocation of Employer Contributions because the Participant is excluded pursuant to the option selected in Section 7(a) of the money purchase pension plan Adoption Agreement or Section 8(a) of the profit sharing plan Adoption Agreement.

2.35 "Investment Manager" shall mean:

(a) a registered investment advisor under the Investment Advisors Act of 1940, a bank as defined in that Act or an insurance company that:

(i) is qualified to perform services relating to the management, acquisition or disposition of Plan assets, and

(ii) has acknowledged fiduciary responsibility to the Plan in writing; or

(b) a bank or trust company that is subject to supervision by the United States or a State, a broker or dealer registered under the Securities Exchange Act of 1934 or a "leasing agency" as defined in Section 3(a)(23) of the Securities Exchange Act of 1934, or a nominee of such bank, trust company, broker or dealer, or clearing agency.

2.36 "Leased Employee" shall mean any person (other than an employee of the recipient) who pursuant to an agreement between the recipient and any other person ("leasing organization") has performed services for the recipient (or for the recipient and related persons determined in accordance with Section 414(n)(6) of the Code) on a substantially full time basis for a period of at

least one (1) year, and such services are of a type historically performed by employees in the business field of the recipient employer. Contributions or benefits provided a Leased Employee by the leasing organization which are attributable to services performed for the recipient employer shall be treated as provided by the recipient employer.

A Leased Employee shall net be considered an employee of the recipient if: (a) such employee is covered by a money purchase pension plan providing: (i) a nonintegrated employer contribution rate of at least ten (10) percent of compensation, as defined in Section 415(c)(3) of the Code, but including amounts contributed pursuant to a salary reduction agreement which are excludable from the employee's gross income under Section 125, 402(a)(8), 402(h) or 403(b) of the Code, (ii) immediate participation, and (iii) full and immediate vesting; and (b) Leased Employees do not constitute more than twenty (20) percent of the recipient's nonhighly compensated workforce.

2.37 "Net Profits" shall mean the Net Profits of the Employer as defined in Section 7 of the Adoption Agreement (for Profit-Sharing Plans).

2.38 "Normal Retirement Age" shall mean the age selected in Section 13 of the Adoption Agreement, at which time a Participant shall be entitled to receive a Normal Retirement Benefit. If the Employer enforces a mandatory retirement age, the Normal Retirement Age is the lesser of that mandatory age or the age specified in the Adoption Agreement.

2.39 "Normal Retirement Benefit" shall mean the benefit to which a Participant is entitled at his Normal Retirement Date.

2.40 "Normal Retirement Date" shall mean the first day of the month coincident with or next following a Participant's Normal Retirement Age.

2.41 "Owner-Employee" shall mean an individual who is a sole proprietor, or who is a partner owning more than ten (10) percent of the capital or profits interest of the partnership.

2.42 "Paired Plans" shall mean two (2) defined contribution plans adopted by the Employer pursuant to Adoption Agreements #001 and #003 under this prototype plan, the Defined Contribution Basic Plan Document #01, when paired under ARTICLE 14. Paired Plans shall be standardized plans established by the Employer pursuant to Revenue Procedure 84-23, as updated by Revenue Procedure 89-9.

2.43 "Participant" shall mean an Employee who meets all applicable conditions of eligibility of Section 5 of the Adoption Agreement and has commenced participation in accordance with such Section and ARTICLE 3 hereof.

2.44 "Plan" shall mean the defined contribution plan established by the Employer as described in the Adoption Agreement, together with the applicable provisions of this Plan, including the Trust established pursuant to ARTICLE 16 hereof, and any and all amendments thereto.

2.45 "Plan Year" shall mean the twelve (12) consecutive month period designated by the Employer in Section 1(d) of the Adoption Agreement.

2.46 "Predecessor Employer" shall mean the same business of the Employer prior to its present form. For example, if the Employer is presently in corporate

form, it shall mean the same business operated as a proprietorship or partnership.

2.47 "Predecessor Plan" shall mean the plan of deferred compensation, if any, which has been amended and restated by adoption of this Plan.'

2.48 "Qualified Joint and Survivor Annuity" shall mean an immediate annuity for the life of the Participant with a survivor annuity for the life of the Spouse as described in Section 11.04(d).

2.49 "Qualified Life Insurance Company" shall mean a legal reserve life insurance company licensed to do business in the State in which the Employer maintains its principal place of business.

2.50 "Retired Participant" shall mean any Participant whose Termination of Employment entitles the Participant to receive benefits under Section 7.01, 7.02 or 7.03, subject to ARTICLE 11.

2.51 "Self-Employed Individual" shall mean an individual who has Earned Income for the taxable year from the trade or business for which the Plan is established; also, an individual who would have had Earned Income but for the fact that the trade or business had no Net Profits for the taxable year.

2.52 "Service" shall mean service as an Employee of the Employer.

2.53 "Sponsor" shall mean General Trust Company, the sponsoring organization.

2.54 "TEFRA" shall mean the Tax Equity and Fiscal Responsibility Act of 1982.

2.55 "Termination of Employment" shall mean the cessation of active work for the Employer. However, should an Employee cease active work due to sickness, injury, leave of absence, or temporary layoff, employment shall be deemed to be continued until receipt by the Trustee, from the Employer, of a written notice of termination. In the giving of such notice of the Employer to the Trustee, all Participants in similar situations shall be treated alike.

2.56 "Trust Fund" shall mean the assets of the Trust established pursuant to ARTICLE 16 hereunder, held and administered by the Trustee for purposes of this Plan.

2.57 "Trust Fund Earnings" shall mean (a) the fair market value of the Trust Fund on the current Allocation Date, minus (b) the fair market value of the Trust Fund on the Allocation Date that immediately precedes the current Allocation Date, minus (c) all contributions paid to the Trust Fund from such preceding Allocation Date through the current Allocation Date (including any dividends or credits earned on insurance contracts), plus (d) all benefits paid to Participants from such preceding Allocation Date through the current Allocation Date (including any insurance premiums paid or accrued).

2.58 "Trustee" shall mean the individual or, jointly and severally, the individuals as specified in Section 3 of the Adoption Agreement who have accepted the duties and responsibilities of this position by execution of the Adoption Agreement or such other writing as will evidence such acceptance. The Trustee shall be specifically limited to those other affiliates of the Sponsor which are legally authorized to perform fiduciary trust services and to those individuals and

organizations permitted by law and authorized in writing by the Sponsor to act as Trustee to the extent so authorized.

2.59 "Vested Benefit" shall mean the portion of an Account to which a Participant is entitled as determined under Section 9.01 of the Plan and Section 11 of the Adoption Agreement.

2.60 "Year of Service" shall mean a twelve (12) consecutive month period during which an Employee has been credited with at least one thousand (1,000) Hours of Service. For eligibility purposes, the period shall be the Eligibility Computation Period. For vesting purposes, the period will be measured by the Plan Year, or the twelve (12) consecutive month period commencing on the date the Employee first performs on Hour of Service and each subsequent twelve (12) consecutive month period commencing on the anniversary of such date, as elected by the Employer in Section 11 of the Adoption Agreement. For all other purposes, the period will be measured by the Plan Year.

If the Employer maintains the plan of a Predecessor Employer, years of service with such Predecessor Employer will be treated as Years of Service for the Employer.

If the first Plan Year is a Short Plan Year (less than twelve (12) consecutive months) or the Plan Year is changed creating a Short Plan Year, the following special rules apply for determining Years of Service:

(a) A Participant receives credit for a Year of Service for purposes of receiving an allocation of Employer Contributions (and Forfeitures, if applicable), and for

purposes of computing rears of Service for vesting purposes and Years of Service for eligibility purposes, if the Participant receives credit for the Applicable Hours during the Short Plan Year. The term Applicable Hours shall equal "X" where X is defined as H/12 times Y where Y equals the number of complete months in the Short Plan Year, and H equals 1,000 Hours of Service.

(b) Notwithstanding the above, if a Participant would have been credited with a Year of Service for vesting purposes during the 12 month period beginning on the first day of the Short Plan Year, then the Participant will receive a Year of Service for vesting purposes for the Short Plan Year.

2.61 "Years of Vesting Service" shall mean the sum of an Employee's Years of Service expressed in whole years; excluding, however, any Years of Service excluded under Section 12 of the Adoption Agreement.

ARTICLE 3

ELIGIBILITY AND PARTICIPATION

3.01 Eligibility.

Each Employee who is not excluded from participation under Section 4 of the Adoption Agreement and who has met tine eligibility requirements set forth in Section 5 of the Adoption Agreement shall be eligible to become a Participant on the Entry Date. Notwithstanding the foregoing, an Employee shall enter the Plan no later than the earlier of:

(a) the first day of the Plan Year beginning after the date on which the Employee has met the minimum age and service requirements; or

(b) six (6) months after the date the requirements are met.

3.02 Participation.

Each Employee who has met the eligibility requirements for participation shall become a Participant as set forth in Section 5 of the Adoption Agreement, with the following exceptions:

(a) In the case of an Employer which maintained a Predecessor Plan, each Employee participating in such plan immediately prior to the Effective Date hereof shall become a Participant on the Effective Date hereof.

(b) If the Plan provides one hundred (100) percent vesting immediately after an Employee completes the eligibility requirements set forth in Section 5 of the Adoption Agreement, and an Employee has a one (1)

year Break in Service before satisfying the Plan's requirements for eligibility, Service before such Break will not be taken into account.

(c) In the case of a Participant who does not have any nonforfeitable right to the Account balance derived from Employer Contributions, Years of Service before a period of consecutive one (1) year Breaks in Service will not be taken into account in computing eligibility service if the number of consecutive one (1) year Breaks in Service in such period equals or exceeds the greater of five (5) or the aggregate number of Years of Service. Such aggregate number of Years of Service will not include any Years of Service disregarded under the preceding sentence by reason of prior Breaks in Service. If a Participant's Years of Service are disregarded pursuant to this subsection (c), such Participant will be treated as a new Employee for eligibility purposes. If a Participant's Years of Service may not be disregarded pursuant to this subsection (c), such Participant shall continue to participate in the Plan, or, if terminated, shall participate immediately upon reemployment.

3.03 Return to Eligible Class.

In the event a Participant is no longer a member of an eligible class of Employees and becomes ineligible to participate but has not incurred a Break in service, such Employee will participate immediately upon returning to an eligible class of Employees. If such Participant incurs a Break in Service, eligibility will be determined pursuant to Section 3.02.

In the event an Employee who is not a member of an eligible class of Employees becomes a member of an eligible class, such Employee will participate immediately if such Employee has satisfied the

minimum age and service requirements and would have otherwise previously become a Participant.

3.04 Transfers Among Adopting Employers Which Are Controlled Group Members.

A transfer of an Employee directly from one adopting Employer which is a Controlled Group Member to another shall not constitute a termination of employment or an interruption in Years of Service; provided, however, that there shall be no duplication of benefits. The Accounts, if any, attributable to a Participant's Service with an Employer which is a Controlled Group Member from which he transferred shall be retained in such Employer's Plan, shall be credited with any Trust Fund Earnings or other adjustments attributable thereto in accordance with Section 5.05 and shall continue to vest based on his continued Years of Service under that Controlled Group Member to which he transferred. Immediately upon his transfer, such Employee shall participate in the plan of the Controlled Group Member to which he transferred; provided, however, that his Years of Service for determining his nonforfeitable benefit under the Plan of the Employer from which he transferred shall count as years of Service under the Plan of the Controlled Group Member to which he transferred.

3.05 Controlled Trades or Businesses.

(a) If this Plan provides contributions or benefits for one or more Owner-Employees who control both the business for which this Plan is established and one or more other trades or businesses, the Plan and the plan established for other trades or businesses must, when looked at as a single plan, satisfy Sections 401(a) and

(d) of the Code for the employees of this and all other trades or businesses.

(b) If the Plan provides contributions or benefits for one or more Owner-Employees who control one or more trades or businesses, the employees of the other trades or businesses must be included in a plan which satisfies Section 401(a) and (d) of the Code and which provides contributions and benefits not less favorable than provided for such Owner-Employee under this Plan.

(c) If an individual is covered as an Owner-Employee under the plans of two or more trades or businesses which are not controlled and the individual controls a trade or business, then the contributions or benefits for the employees under the plan of the trade or business which are controlled must be as favorable as those provided for him under the most favorable plan of the trades or businesses which are not controlled.

(d) For purposes of subsections (a), (b) and (c), an Owner-Employee, or two or more Owner-Employees shall be considered to control a trade or business if such Owner-Employee, or such two or more Owner-Employees together:

(i) own the entire interest in an unincorporated trade or business, or

(ii) in the case of a partnership, own more than 50 percent of either the capital interest or the profits interest in the partnership.

For purposes of the preceding sentence, an Owner-Employee, or two or more Owner-Employees shall be treated as owning any interest in a partnership which is

owned, directly or indirectly, by a partnership which such Owner-Employee or such two or more Owner-Employees, are considered to control within the meaning of the preceding sentence.

3.06 Acceptance.

The Plan shall not be deemed either to constitute a contract between the Employer and any Participant or to be a consideration or an inducement for the employment of any Employee. No provision of the Plan shall be deemed to abridge or limit any managerial right of the Employer or to give any Employee or Participant the right to be retained in employment, or to interfere with the right of the Employer to discharge any Employee or Participant at any time, regardless of the effect which such discharge may have upon him as a Participant. By his act of participation herein, each Participant, on behalf of himself, his heirs, assigns and Beneficiary or Beneficiaries shall be deemed conclusively to have agreed to and accepted the terms and conditions of the Plan.

ARTICLE 4

CONTRIBUTIONS

4.01 Employer Contributions.

If the Plan is a profit sharing plan, then each Plan Year the Employer shall make a contribution computed under Section 7 of the Adoption Agreement. Such contribution may be made either in cash or in other property acceptable to the Trustee.

If the Plan is a money purchase pension plan, then each Plan Year the Employer shall make a contribution as a minimum funding standard computed under Section 7 of the Adoption Agreement on behalf of Participants who are entitled to receive an allocation pursuant to Section 7 of the Adoption Agreement. The Employer Contribution may be made either in cash or in other property acceptable to the Trustee.

Notwithstanding the foregoing, if the Plan is a non-standardized plan, then a Self-Employed Individual, an Owner Employee or an Employee who is not an officer, shareholder or highly compensated individual may elect not to participate in the Plan in a Plan Year or, at his election, may direct the Employer not to contribute on his behalf for a Plan Year, or to contribute for a Plan Year a lesser portion than that to be contributed on behalf of other Participants for the Plan Year according to the contribution and allocation formulas of the Plan. Such an election shall be in writing and shall be made in such form, and at such time, as the Employer may require. An Employee who is a partner in a partnership Employer that adopts the Plan may elect to make a one-time irrevocable election upon the Employee's Employment Commencement Date or upon the

Employee's date of Plan participation not to participate in the Plan or to direct the Employer not to contribute on his behalf. Such an election shall be in writing and shall be made in such form, and at such time, as the Employer may require.

4.02 Employee Contributions.

(a) Voluntary Contributions.

Except as provided for in Section 6.0.7, this Plan will not accept nondeductible Voluntary Contributions for Plan Years beginning after the Plan Year in which this Plan is adopted by the Employer. Voluntary Contributions for Plan Years beginning after December 31, 1986, together with any Matching Contributions as defined in Section 401(m) of the Code, will be limited so as to meet the nondiscrimination test of Section 401(m).

(b) Deductible Contributions.

The Administrator will not accept Deductible Contributions which are made for a taxable year beginning after December 31, 1986. Deductible Contributions made prior to that date will be maintained in a separate Account which will be nonforfeitable at all times. The Account will share in the gains and losses of the Trust Fund in the same manner as described in Section 5.05. No part of the Deductible Contributions Account will be used to purchase life insurance. Subject to ARTICLE 11 (if applicable), the Participant may withdraw any part of the Deductible Contributions Account by making a written application. to the Administrator.

4.03 Elective Deferrals.

If the Plan is a profit sharing plan and the Employer selects the CODA option under Section 24 of the Adoption Agreement, subject to the limitations and requirements of ARTICLE 6, beginning with the first full payroll period beginning after the later of (a) the Effective Date or (b) the date this Plan is communicated to the Participants, each Employee who is eligible to participate in the Plan and who desires to make Elective Deferrals shall sign a written participation form (hereinafter referred to as the "Salary Reduction Agreement"). The terms of the Salary Reduction Agreement shall provide that the Participant agrees to accept a reduction in Compensation from- the Employer in whole percentages or specified dollar amounts as provided in Section 24, Item 2 of the Adoption Agreement; provided, however, that in no event shall the reduction in Compensation, when added to the amount allocated to the Participant's Employer Contributions Account pursuant to Section 8 of the Adoption Agreement, exceed the limits outlined in Section 5.07. In consideration of such Agreement, the Employer will make a contribution (referred to as an Elective Deferral) to the Plan on behalf of the Participant for such payroll period in an amount equal to the total amount by which the Participant's Compensation was reduced during the payroll period pursuant to the Salary Reduction Agreement.

4.04 Rollover Contributions.

If so authorized under Section 10 of the Adoption Agreement, an Employee may roll over to this Plan the following: (a) His interest in a pension, profit-sharing or stock bonus plan qualified under Section 401(a) or 403(a) of the Code to this Plan, provided that:

(i) no part of the distribution is attributable to contributions made on behalf of the Employee while he was a Key Employee in a Top-Heavy Plan as defined in Section 13.01;

(ii) the amount distributed from such plan is transferred to this Plan no later than the 60th day after such distribution was received by the Employee;

(iii) the distributing, constituted the Employee's entire nonforfeitable interest in such plan and was made within one taxable year to the Employee as a lump sum distribution; and

(iv) the amount transferred to this Plan does not include any voluntary employee contributions made by the Employee to the prior plan.

(b) An Individual Retirement Plan qualified under Section 408 of the Code, where the Individual Retirement Plan was used as a conduit from the plan from which the distribution was made and the rollover is made in accordance with subsection (a), provided that the amount so transferred does not include:

(i) amounts received by the Individual Retirement Plan that were attributable to contributions made on behalf of a Self-Employed Individual, and

(ii) contributions made by the Employee to the Individual Retirement Plan or earnings on such contributions.

Furthermore, a rollover of "accumulated Deductible Employee Contributions" (as defined by Section 72(o) of the Code) may be made if and to the extent permitted by the Secretary of the Treasury. An

Employee's interest in such rollover and earnings thereon shall remain 100 percent vested and nonforfeitable at all times.

4.05 Trustee-To-Trustee Transfers.

If so authorized under Section 10 of the Adoption Agreement, an Employee may make a direct transfer of plan assets attributable to his participation in a pension, profit-sharing or stock bonus plan qualified under Section 401(a) of the Code to the Plan from such other plan by that plan's trustee. A separate account shall be established for such assets in the name of the Employee. Such assets, together with all records relating to accrued benefits, contributions and account balances shall be accepted from the trustee or custodian under the qualified plan, or, in the case of insurance policies, from the owner thereof if different from the trustee or custodian. An Employee's interest in the separate account and earnings thereon shall remain 100 percent vested and nonforfeitable at all times. Such account shall be subject to the requirements set forth in ARTICLE 11.

Assets attributable to employment as an Owner-Employee under an H.R.-10 plan (exclusive of the portion attributable to voluntary contributions thereunder) shall not begin to be distributed before the Employee dies, incurs a Disability or attains age 59-1/2, nor later than the taxable year in which the Employee attains age 70-1/2.

No part of such direct transfer may consist of Voluntary Contributions. Likewise, the Trustee may make such a direct transfer from this Plan of assets attributable to a Participant's participation in this Plan

to another pension, profit-sharing or stock bonus plan qualified under Section 401(a) of the Code.

Such direct trustee-to-trustee transfers shall not be considered either in determining the maximum benefits permissible under the Plan pursuant to Section 5.07 hereof or as contributions by the Employer under Section 7 of the Adoption Agreement.

4.06 Prohibition of Reversion.

Contributions made by the Employer to the Plan shall be made irrevocably and it shall be impossible for the assets of the Plan to inure to the benefit of the Employer or to be used in any manner other than for the exclusive purpose of providing benefits to Participants, Inactive Participants, Retired Participants and Beneficiaries, and for defraying reasonable expenses of administering the Plan; provided, however, that nothing herein shall be construed to prohibit the return to the Employer of all or part of a Contribution:

(a) which is made by the Employer due to a mistake of fact, provided the return of such Contribution is made within one (1) year after the date of payment thereof, or

(b) which is conditioned upon initial qualification of the Plan under the Code pursuant to Section 17.06, provided the return is made, if the Plan does not qualify, within one year after the denial of qualification by the Internal Revenue Service, but only if the application for the qualification is made by the time prescribed by law for filing the Employer's return for the taxable year in which the Plan is adopted, or such later date as the Secretary of the Treasurer may prescribe, or

(c) to the extent a deduction thereof under Section 404 of the Code is disallowed, provided the return of such Contribution is limited to the amount disallowed and is made within one year after the disallowance.

ARTICLE 5

PARTICIPANTS' ACCOUNTS

5.01 Establishment of Participants' Accounts.

The Trustee shall maintain separate Accounts for each Employee to which will be credited contributions and earnings as follows:

(a) Employer Contributions Account. Employer Contributions made on the Participant's behalf pursuant to Section 7 of the Adoption Agreement and Forfeitures reallocated pursuant to Section 7 of the Adoption Agreement, if applicable, will be maintained in a separate Account.

(b) Voluntary Contributions Account. Voluntary Contributions made by the Participant pursuant to Section 6.07, if any, will be maintained in a separate Account which will be nonforfeitable at all times.

(c) Matching Contributions Account. Matching Contributions made by the Employer on the Participant's behalf pursuant to Section 6.08, will be maintained in a separate Account.

(d) Deductible Contributions Account. Deductible Contributions which are made for taxable years beginning before January 1, 1987 will be maintained in a separate Account which will be nonforfeitable at all times. No part of the Deductible Contribution Account will be used to purchase life insurance. Subject to ARTICLE 11 (if applicable), the Participant may withdraw any part of the Deductible Contribution Account by making a written application to the Administrator.

(e) Elective Deferral Account. Elective Deferrals made on the Participant's behalf through an applicable Salary Reduction Agreement pursuant to Section 6.01, and the interest, dividends, earnings or proceeds of any insurance policy(ies) purchased with funds from this Account will be maintained in a separate Account which will be nonforfeitable at all times.

(f) Rollover Account. Rollover Contributions made by an Employee pursuant to Section 4.04 will be maintained in a separate Account which will be nonforfeitable at all times.

(g) Trustee-to-Trustee Transfer Account. Trustee-to-Trustee Transfers made by an Employee pursuant to Section 4.05 will be maintained in a separate Account which will be nonforfeitable at all times. Such Account shall be subject to the rules of ARTICLE 11.

(h) Participant-Directed Investment Account. Participant-Directed Investments, if elected by the Employer in Section 17 of the Adoption Agreement, will be maintained in a separate Account, but such Account shall not be segregated and shall be maintained separately only for bookkeeping purposes.

Each of the Accounts described above, except for Participant-Directed Investment Accounts, will share in the gains and losses of the Trust Fund in the same manner as described in Section 5.05. Each of the Accounts described above shall be debited with all disbursements to the Participant or his Beneficiary and, except for Deductible Contributions Accounts, the purchases of insurance policies from this Account.

5.02 Valuation of Trust Fund.

(a) The assets of the Trust Fund will be valued annually at fair market value as of the last day of the Plan Year. On such date, the earnings and losses of the Trust Fund will be allocated to each Participant's Accounts in the ratio that such Account balances bear to all Account balances.

(b) If the Plan is fully insured, any dividends or credits earned on insurance contracts will be applied, within the taxable year of the Employer in which received or within the next succeeding taxable year, toward the next premiums due before any further Employer Contributions are so applied.

(c) If the Plan is trusteed, any dividends or credits earned on insurance contracts will be allocated to the Participant's Account derived from Employer Contributions for whose benefit the contract is held.

5.03 Allocation of Employer Contributions.

On each Allocation Date, on behalf of each eligible Participant, Employer Contributions shall be allocated to such Participant's Employer Contributions Account in accordance with Section 8 of the Adoption Agreement.

If the Plan is a profit-sharing plan and the Plan is integrated with Social Security, as elected in Section 8 of the Adoption Agreement, Employer Contributions for the Plan Year plus any Forfeitures will be allocated to Participants' Accounts as follows:

STEP ONE: Contributions and Forfeitures will be allocated to each Participant's Account in the ratio that

each Participant's total Compensation bears to all Participant's total Compensation, but not in excess of 3% of each Participant's Compensation.

STEP TWO: Any Contributions and Forfeitures remaining after the allocation in Step One will be allocated to each Participant's Account in the ratio that each Participant's Compensation for the Plan Year in excess of the integration level bears to the excess Compensation of all Participants, but not in excess of 3%.

STEP THREE: Any Contributions and Forfeitures remaining after the allocation in Step Two will be allocated to each Participant's Account in the ratio that the sum of each Participant's total Compensation and Compensation in excess of the integration level bears to the sum of all Participants total Compensation and Compensation in excess of the integration level, but not in excess of the maximum profit-sharing disparity rate.

STEP FOUR: Any remaining Employer Contributions or Forfeitures will be allocated to each Participant's Account in the ratio that each Participant's total Compensation for the Plan Year bears to all Participants' total Compensation for that Year.

The integration level shall be equal to the taxable wage base or such lesser amount elected by the Employer in Section 8 of the Adoption Agreement. The taxable wage base is the maximum amount of earnings which may be considered wages for a Year under Section 3121(a)(1) of the Code in effect as of the beginning of the Plan Year.

Compensation shall mean Compensation as defined in Section 13.02.

The maximum profit-sharing disparity rate is equal to the lesser of

(a) 2.7%

(b) the applicable percentage determined in accordance with the table below:

If the integration level Is more than	But not more than	The applicable percentage is:
$0	X*	2.7%
X* of TWB	80% of TWB	1.3%
80% of TWB	Y**	2.4%

*X = the greater of $10,000 or 20 percent of the TWB
**Y = any amount more than 80% of the TWB but less than 100%, of the TWB.

If the integration level used is equal to the taxable wage base, the applicable percentage is 2.7%.

5.04 Forfeitures.

On each Allocation Date, any Forfeitures occurring will be disposed of in the following manner:

(a) If the Plan is a profit sharing plan, any Forfeitures occurring will be aggregated with any Employer Contributions for the Plan Year and allocated in accordance with Section 8 of the Adoption Agreement;

(b) If the Plan is a money purchase pension plan, as elected by the Employer in Section 11 of the Adoption Agreement:

(i) any Forfeitures occurring will reduce Employer Contributions for the next Plan Year, or

(ii) Forfeitures will be allocated in the ratio that the Compensation of each Participant bears to that of all Participants.

No Forfeitures will occur solely as a result of an Employee's withdrawal of Voluntary Contributions.

5.05 Trust Earnings and Losses.

On each Allocation Date, each Participant's Account shall be credited or charged with such Account's share of the Trust Fund Earnings or losses since the last Allocation Date. With respect to Participant-Directed Investment Accounts, earnings and losses shall be credited or charged to these Accounts as set forth in Section 5.08 hereof. With respect to the other Accounts of the Participant not directed pursuant to Section 5.08 hereof, earnings and losses shall be in the same proportion to such Trust Fund Earnings that such Account balance on the last Allocation Date bears to the total of the non-directed Account balances on the last Allocation Date of all Participants who were Participants on the last Allocation Date and who are Participants on the current Allocation Date. In determining the Account balances on the last Allocation Date, (i) the Elective Deferral Account shall be increased by one-half of any Elective Deferrals (excluding any additional Elective Deferrals made during the last complete payroll period of a Plan Year) credited to the Elective Deferral Account since' the

preceding Allocation Date, (ii) each Employer Contributions Account balance shall be reduced by the cash surrender value of any life insurance policies included in the Employer Contributions Account balance on the last Allocation Date, and (iii) each Account shall be reduced by the amount of any disbursements from such Account during the Plan Year. Alternatively, if approved by the Trustee (or custodian) and the Administrator, Trust Fund Earnings may be allocated in any equitable, uniform and nondiscriminatory manner which is selected for the purpose of recognizing the timing of contributions, withdrawals, distributions, transfers, Participant or Employer directed investments or other temporal events affecting Account value as adjustments to Account balances.

If a Participant rolls over or transfers funds pursuant to Section 4.04 or 4.05 during the Plan Year, then for purposes of allocating the Participant's share of the Trust Fund Earnings and losses' for that same Plan Year, the Participant's Rollover Account balance or Trustee-to-Trustee Transfer Account balance as of the preceding Allocation Date shall include the amount the Participant rolls over or transfers during the Plan Year, times the number of days in the Plan Year in which the rollover or transfer occurs, beginning with the day of the transfer or rollover, divided by 365.

5.06 Inactive Participants.

Unless otherwise provided under Section 8(b) of the Adoption Agreement, an Inactive Participant shall not be entitled to share in Employer Contributions, or Forfeitures if applicable, for a Plan Year. Nevertheless, his Accounts shall be maintained and credited or charged with Trust Fund Earnings in accordance with

Section 5.05 hereof, until the balance thereof (to the extent vested) shall have been fully distributed.

5.07 Limitations on Allocations.

(a) Participant in One Defined Contribution Plan.

(i) If the Participant does not participate in, and has never participated in, another qualified plan, a welfare benefit fund as described in Section 419(e) of the Code maintained by the Employer, or an individual medical account as described in Section 415(1)(2) of the Code maintained by the Employer, which provides an Annual Addition as defined in subsection (e)(i), the amount of Annual Additions which may be credited to the Participant's Individual Account for any Limitation Year will not exceed the lesser of the Maximum Permissible Amount or any other limitation contained in this Plan. If the Employer Contribution that would otherwise be contributed or allocated to the Participant's Employer Contributions Account would cause the Annual Additions for the Limitation Year to exceed the Maximum Permissible Amount, the amount contributed or allocated will be reduced so that the Annual Additions for the Limitation Year will equal the Maximum Permissible Amount.

(ii) Prior to determining the Participant's actual Compensation for the Limitation Year, the Employer may determine the Maximum Permissible Amount for a Participant on the basis of a reasonable estimation of the Participant's Compensation for the Limitation Year, uniformly determined for all Participants similarly situated.

(iii) As soon as is administratively feasible after the end of the Limitation Year, the Maximum Permissible

Amount for the Limitation Year will be determined on the basis of the Participant's actual Compensation for the Limitation Year.

(iv) If pursuant to subsection (iii) or as a result of the allocation of Forfeitures, there is an Excess Amount, the excess will be disposed of as follows:

(1) Any nondeductible Voluntary Contributions, to the extent they would reduce the Excess Amount, will be returned to the Participant;

(2) If after the application of paragraph (1) an Excess Amount still exists, and the Participant is covered by the Plan at the end of the Limitation
Year, the Excess Amount in the Participant's Employer Contributions Account will be used to reduce Employer Contributions (including any allocation of Forfeitures) for such Participant in the next Limitation Year, and each succeeding Limitation Year if necessary.

(3) If after the application of paragraph (1) an Excess Amount still exists, and the Participant is not covered by the Plan at the end of a Limitation Year, the Excess Amount will be held unallocated in a suspense account. The suspense account will be applied to reduce future Employer Contributions (including allocation of any Forfeitures) for all remaining Participants in the next Limitation Year, and each succeeding Limitation Year, if necessary.

(4) If a suspense account is in existence at any time during a Limitation Year pursuant to this Section, it will not participate in the allocation of the Trust's investment gains and losses. If a suspense account is in existence at any time during a particular Limitation Year, all amounts in the suspense account must be

allocated and reallocated to Participants' Accounts before any Employer Contributions or any Employee Contributions may be made to the Plan for that Limitation Year. Excess amounts may not be distributed to Participants or former Participants.

(b) Participant Covered Under Another Defined Contribution Plan.

(i) This Section applies if, in addition to this Plan, the Participant is covered under another qualified Master or Prototype defined contribution plan maintained by the Employer, a welfare benefit fund as defined in Section 419(e) of the Code maintained by the Employer, or an individual medical account, as defined in Section 415(1)(2) of the Code maintained by the Employer, which provides an Annual Addition as defined in subsection (e)(i), during any Limitation Year. The Annual Additions which may be credited to a Participant's Accounts under this Plan for any such Limitation Year will not exceed the Maximum Permissible Amount reduced by the Annual Additions credited to a Participant's individual account under the other plans and welfare benefit funds for the same Limitation Year. If the Annual Additions with respect to the Participant under other defined contribution plans and welfare benefit funds maintained by the Employer are less than the Maximum Permissible Amount and the Employer Contribution that would otherwise be contributed or allocated to the Participant's Employer Contributions Account under this Plan would cause the Annual Additions for the Limitation Year to exceed this limitation, the amount contributed or allocated will be reduced so that the Annual Additions under all such plans and funds for the Limitation Year will equal the Maximum Permissible Amount. If the Annual Additions with respect to the Participant under such other

defined contribution plans and welfare benefit funds in the aggregate are equal to or greater than the Maximum Permissible Amount, no amount will be contributed or allocated to the Participant's Accounts under this Plan for the Limitation Year.

(ii) Prior to determining the Participant's actual Compensation for the Limitation Year, the Employer may determine the Maximum Permissible Amount for a Participant in the manner described in subsection (a) (ii).

(iii) As soon as is administratively feasible after the end of the Limitation Year, the Maximum Permissible Amount for the Limitation Year will be determined on the basis of the Participant's actual Compensation for the Limitation Year.

(iv) If, pursuant to subparagraph (iii) or as a result of the allocation of Forfeitures, a Participant's Annual Additions under this Plan and such other plans would result in an Excess Amount for a Limitation Year, the Excess Amount will be deemed to consist of the Annual Additions last allocated, except that Annual Additions attributable to a welfare benefit fund or individual medical account will be deemed to have been allocated first, regardless of the actual Allocation Date.

(v) If an Excess Amount was allocated to a Participant on an Allocation Date of this Plan which coincides with an allocation date of another plan, the Excess Amount attributed to this Plan will be the product of:

(1) the total Excess Amount allocated as of such date, times

(2) the ratio of (A) the Annual Additions allocated to the Participant for the Limitation Year as of such date under this Plan to (B) the total Annual Additions allocated to the Participant for the Limitation Year as of such date under this and all the other qualified Master or Prototype defined contribution plans.

(vi) Any Excess Amount attributed to this Plan will be disposed in the manner described in subsection (a) (iv).

(c) Participant Covered Under Another Defined Contribution Plan Which Is Not A Master Or Prototype Plan.

If the Participant is covered under another qualified defined contribution plan maintained by the Employer which is not a Master or Prototype Plan, Annual Additions which may be credited to the Participant's Accounts under this Plan for any Limitation Year will be limited in accordance with subsections (b) and (c) as though the other plan was a Master or' Prototype Plan unless the Employer provides other limitations in Section 19 of the Adoption Agreement.

(d) Participant Covered Under A Defined Benefit Plan. If the Employer maintains, or at any time maintained, a qualified defined benefit plan covering any Participant in this Plan, the sum of the Participant's Defined Benefit Plan Fraction and Defined Contribution Plan Fraction will not exceed 1.0 in any Limitation Year. The Annual Additions which may be credited to the Participant's Accounts under this Plan for any Limitation Year will be limited in accordance with Section 19 of the Adoption Agreement.

(e) Definitions.

(i) Annual Additions: The sum of the following amounts credited to a Participant's Accounts for the Limitation Year:

(1) Employer Contributions, including Elective Deferrals;

(2) Employee Contributions;

(3) Forfeitures, if applicable; and

(4) Amounts allocated, after March 31, 1984, to an individual medical account as defined in Section 415(1)(2) of the Code, which is part of a pension or annuity plan maintained by the Employer are treated as Annual Additions to a defined contribution plan. Also, amounts derived from contributions paid or accrued after December 31, 1985, in taxable years ending after such date, which are attributable to post-retirement medical benefits, allocated to the separate account of a Key Employee, as defined in Section 419A(d)(3) of the Code, under a welfare benefit fund as defined in Section 419(e) of the Code maintained by the Employer, are treated as Annual Additions to a defined contribution plan.

For this purpose, any Excess Amount applied under subsection (a) (iv) or (b) (iv) in the Limitation Year to reduce Employer Contributions will be considered Annual Additions for such Limitation Year.

(ii) Compensation: A Participant's earned income, wages, salaries, and fees for professional services and other amounts received for personal services actually rendered in the course of employment with the

Employer maintaining the Plan (including, but not limited to, commissions paid to salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips and bonuses), and excluding the following:

(1) Employer contributions to a plan of deferred compensation which are not includible in the Employee's gross income for the taxable year in which contributed, or Employer contributions under a simplified employee pension plan to the extent such contributions are deductible by the Employee, or any distributions from a plan of deferred compensation;

(2) Amounts realized from the exercise of a non-qualified stock option, or when restricted stock (or property) held by the Employee either becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

(3) Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

(4) Other amounts which received special tax benefits, or contributions made by the Employer (whether or not under a salary reduction agreement) towards the purchase of an annuity described in Section 403(b) of the Code (whether or not the amounts are actually excludible from the gross income of the Employee).

For purposes of applying the limitations of this Section 5.07, Compensation for a Limitation Year is the Compensation actually paid or includible in gross income during such limitation year.

Notwithstanding the preceding sentence, Compensation for a Participant in a defined contribution plan who has incurred a Disability is the Compensation such Participant would have received for the Limitation Year if the Participant was paid at the rate of Compensation paid immediately before incurring the Disability; such imputed Compensation for the disabled Participant may be taken into account only if the Participant is not a Highly Compensated Employee and contributions made on behalf of such Participant are nonforfeitable when made.

(iii) Defined Benefit Fraction: A fraction, the numerator of which is the sum of the Participant's Projected Annual Benefits under all the defined benefit plans (whether or not terminated) maintained by the Employer, and the denominator of which is the lesser of 125 percent of the dollar limitation determined for the Limitation Year under Sections 415(b) and (d) of the Code or 140 percent of the Highest Average Compensation, including any adjustments under Section 415(b) of the Code.

Notwithstanding the above, if the Participant was a Participant as of the first day of the first Limitation Year beginning after December 31, 1986, in one or more defined benefit plans maintained by the Employer which were in existence on May 6, 1986, the denominator of this fraction will not be less than 125 percent of the sum of the Annual Benefits under such plans which the Participant had accrued as of the close of the last Limitation Year beginning before January 1, 1987, disregarding any changes in the terms and conditions of the Plan after May 5, 1986. The preceding sentence applies only if the defined benefit plans individually and in the aggregate satisfied the requirements of Section

415 for all Limitation Years beginning before January 1, 1987.

(iv) Defined Contribution Dollar Limitation: $30,000 or if greater, one-fourth of the defined benefit dollar limitation set forth in Section 415(b)(1) of the Code as in effect for the Limitation Year.

(v) Defined Contribution Fraction: A fraction, the numerator of which is the sum of the Annual Additions to the Participant's accounts under all the defined contribution plans (whether or not terminated) maintained by the Employer for the current and all prior Limitation Years (including the Annual Additions attributable to the Participant's nondeductible voluntary employee contributions to all defined benefit plans, whether or not terminated, maintained by the Employer, and the Annual Additions attributable to all welfare benefit funds, as defined in Section 419(e) of the Code, and individual medical accounts, as defined in Section 415(1)(2) of the Code, maintained by the Employer), and the denominator of which is the sum of the Maximum Aggregate Amounts for the current and all prior Limitation Years with the Employer (regardless of whether a defined contribution plan was maintained by the Employer). The Maximum Aggregate Amount in any Limitation Year is the lesser of 125 percent of the dollar limitation determined under Sections 415(b) and (d) of the Code in effect under Section 415(c)(1)(A) of the Code or 35 percent of the Participant's Compensation for such year.

If the Employee was a Participant as of the end of the first day of the first Limitation Year beginning after December 31, 1986, in one or more defined contribution plans maintained by the Employer which were in existence on May 6, 1986, the numerator of this

fraction will be adjusted if the sum of this fraction and the Defined Benefit Fraction would otherwise exceed 1.0 under the terms of this Plan. Under the adjustment, an amount equal to the product of (1) the excess of the sum of the fractions over 1.0 times (2) the denominator of this fraction, will be permanently subtracted from the numerator of this fraction. The adjustment is calculated using the fractions as they would be computed as of the end of the last Limitation Year beginning before January 1, 1987, and disregarding any changes in the terms and conditions of the Plan made after May 5, 1986, but using the Section 415 limitation applicable to the first Limitation Year beginning on or after January 1, 1987.

The Annual Addition for any Limitation Year beginning before January 1, 1987, shall not be recomputed to treat all Participant contributions as Annual Additions.

(vi) Employer: For purposes of this Section 5.07, Employer shall mean the Employer that adopts this Plan, and all Controlled Group Members as that term is modified by Section 415(h) of the Code.

(vii) Excess Amount: The excess of the Participant's Annual Additions for the Limitation Year over the Maximum Permissible Amount.

(viii) Highest Average Compensation: The Average Compensation for the three consecutive Years of Service that produces the highest average. A Year of Service is the 12-consecutive month period defined in Section 11 of the Adoption Agreement.

(ix) Limitation Year: A calendar year, or the twelve (12) consecutive month period elected by the Employer in Section 1(c) of the Adoption Agreement. All qualified

plans maintained by the Employer must use the same Limitation Year. If the Limitation Year is amended to a different 12-consecutive month period, the new Limitation Year must begin on a date within the Limitation Year in which the amendment is made.

(x) Master or Prototype Plan: A Plan the form of which is the subject of a favorable opinion letter from the Internal Revenue Service.

(xi) Maximum Permissible Amount: The maximum Annual Addition that may be contributed or allocated to a Participant's Accounts under the Plan for any Limitation Year shall not exceed the lesser of:

(1) The Defined Contribution Dollar limitation; or

(2) 25 percent of the Participant's Compensation for the Limitation Year.

The Compensation limitation referred to in (2) shall not apply to any contribution for medical benefits (within the meaning of Section 401(h) or 419A(f)(2) of the Code) which is otherwise treated as an Annual Addition under Section 415(1)(1) or 419A(d)(2) of the Code.

If a short Limitation Year is created because of an amendment changing the Limitation Year to a different twelve consecutive-month period, the Maximum Permissible Amount will not exceed the Defined Contribution Dollar Limitation multiplied by the following fraction:

number of months in the short Limitation Year 12

(xii) Projected Annual Benefit: The annual retirement benefit (adjusted to an actuarially equivalent straight-life annuity if such benefit is expressed in a form other than a straight-life annuity or qualified joint and survivor annuity) to which the Participant would be entitled under the terms of the Plan assuming:

(1) the Participant will continue employment until Normal Retirement Age under the Plan (or current age, if later), and

(2) the Participant's Compensation for the current Limitation Year and all other relevant factors used to determine benefits under the Plan will remain constant for all future Limitation Years.

5.08 Participant-Directed Investments.

If elected by the Employer in Section 17 (a) or (b) of the Adoption Agreement, each Participant may direct the Trustee as to the type of investment to be purchased with the Participant's Accounts other than the non-vested portion of his Employer Contributions Account. Any directions to the Trustee with respect to investments shall be delivered in writing to the Trustee and shall be on a form for such purpose provided by the Trustee. Directed investments to be executed by the Trustee shall be made by the Trustee as soon as reasonably possible after actual receipt of such direction; provided, however, that the Trustee shall not be liable for any loss to the Account due to reasonable delay in the execution of such directions. Such directed investments shall be limited to those investments set forth in Section 16.03(a) hereof, and may be made without any duty to diversify. The Trustee may leave earnings on any securities so obtained for reinvestment in accordance with the direction of the Participant.

Notwithstanding the foregoing, in no event shall a directed investment of a Participant be permitted in such an investment that the Trustee, in its sole discretion, deems itself unable to administer efficiently, properly and conveniently with respect thereto; provided, however, that the Trustee's acceptance of the administration of a directed investment shall not be unreasonably withheld. Upon establishing such separate account, it shall be credited or charged only with the increases or decreases resulting from the administration and investment thereof as a separate unit, except that the Trustee shall charge against such account a pro rata portion of the fees and expenses incurred in the administration of the Plan in general, as well as the fees and expenses properly chargeable only to such segregated account. Thereafter, the value of the Accounts of a Participant who directs the segregation thereof under this Section shall be determined by reference to the value of the Accounts as of any applicable date of determination, notwithstanding any other provision of the Plan. The Trustee shall be under no duty to question any such direction of a Participant with respect to investments, nor shall the Trustee be required to review any securities or., the property held in the Account. Neither the Trustee nor the Employer shall have any liability whatsoever for any losses which may result from either the Participant's direction or any investment decision made pursuant to this Section, or for any loss which may result by reason of the failure of a Participant to make such directions. Nor shall the Trustee or the Employer have any liability or responsibility whatsoever for any disparity between the performance or rates of investment return of Participant-Directed Accounts and the Trust Fund in general. A Participant shall be entitled to direct the investment of his Account

hereunder at such time and in such manner as may be non-discriminatorily established by the Employer.

ARTICLE 6

CASH OR DEFERRED ARRANGEMENT

6.01 Salary Reduction Agreement.

(a) Unless the Employer specifies otherwise, the Salary Reduction Agreement described in Section 4.03 shall apply to each payroll period, beginning with the first payroll period after the Entry Date following the execution of the Salary Reduction 'Agreement, and continuing until such time as the Participant elects otherwise or terminates employment.

(b) The Salary Reduction Agreement may be amended by the Participant to change the amount of the Compensation reduction. A change in the amount of the Compensation reduction can be made for the first payroll period of the Plan Year next following the timely notice of change, or any other date selected by the Employer in the Adoption Agreement. Such notice of change must be filed with the Administrator prior to the date the change is effective.

(c) If elected by the Employer in the Adoption Agreement, the Salary Reduction Agreement may be amended by the Participant to increase the amount of the Compensation reduction for the last complete payroll period of the Plan Year.

(d) A separate Salary Reduction Agreement may be executed whereby the Participant elects to accept a reduction in Compensation which is attributable to a bonus.Such election may be made and the Salary Reduction Agreement executed at any time prior to the payment of the bonus.

(e) A Participant may elect to suspend the Compensation reduction at any time. A notice of suspension shall be effective until it is revoked by the Participant. A suspension revocation shall be accomplished by filing a new Salary Reduction Agreement in accordance with the terms of the Adoption Agreement.

(f) The Salary Reduction Agreement of a Participant who is a Highly Compensated Employee may be amended by the Participant to decrease the amount of the Compensation reduction for the balance of a Plan Year if a mid-year or interim Actual Deferral Percentage test indicates that the Participant will have Excess Contributions for the Plan Year.

(g) If the Employer elects in the Adoption Agreement to permit withdrawals and a Participant makes such a withdrawal, the Participant's Elective Deferrals will be suspended during the 12-month period following the withdrawal.

In accordance with Section 401(k) of the Code, all amounts withheld from a Participant's Compensation in accordance with this Section and contributed as Elective Deferrals to the Plan shall not be included in the gross income for the Participant for federal tax purposes, and shall be deemed for tax purposes to be an Employer Contribution to the Plan. Such Contributions shall be included in gross income for FICA and FUTA tax purposes.

6.02 Annual Limit on Elective Deferrals.

No Participant shall be permitted to have Elective Deferrals made under this Plan, or any other qualified plan maintained by the Employer, during any taxable year, in excess of the dollar limitation contained in

Section 402(g) of the Code in effect at the beginning of such taxable year.

If a Participant receives a hardship distribution pursuant to Section 6.16, the dollar limitation described above, for the Participant's taxable year immediately following the taxable year of the hardship distribution shall be reduced by the amount of the Participant's Elective Deferrals for the taxable year of the hardship distribution.

6.03 Distribution of Excess Elective Deferrals.

A Participant may assign to this Plan any Excess Elective Deferrals made during a taxable year of the Participant by notifying the Administrator on or before the date specified in the Adoption Agreement of the amount of the Excess Elective Deferrals to be assigned to the Plan.

Notwithstanding any other provision of the Plan, Excess Elective Deferrals, plus any income and minus any loss allocable thereto, shall be distributed no later than April 15 to any Participant to whose account Excess Elective Deferrals were assigned for the preceding year and who claims Excess Elective Deferrals for such taxable year.

Definitions:

(a) "Elective Deferrals" shall mean any Employer Contributions made to the Plan at the election of the Participant, in lieu of cash Compensation, and shall include Contributions made pursuant to a Salary Reduction Agreement or other deferral mechanism. With respect to any taxable year, a Participant's Elective Deferral is the sum of all Employer

Contributions made on behalf of such Participant pursuant to an election to defer under any qualified CODA as described in Section 401(k) of the Code, any simplified employee pension cash or deferred arrangement as described in Section 402(h)(1)(B) of the Code, any eligible deferred compensation plan under Section 457 of the Code, any plan as described under Section 501(c)(18) of the Code, and any Employer contributions made on the behalf of a Participant for the purchase of an annuity contract under Section 403(b) of the Code pursuant to a Salary Reduction Agreement.

(b) "Excess Elective Deferrals" shall mean those Elective Deferrals that are includible in a Participant's gross income under Section 402(8) of the Code to the extent such Participant's Elective Deferrals for a taxable year exceed the dollar limitation under such Code section. Excess Elective Deferrals shall be treated as Annual Additions under the Plan.

Determination of income or loss: Excess Elective Deferrals shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Elective Deferrals is the sum of: (1) income or loss allocable to the Participant's Elective Deferral Account for the taxable year multiplied by a fraction, the numerator of which is such Participant's Excess Elective Deferrals for the year and the denominator is the Participant's Account balance attributable to Elective Deferrals without regard to any income or loss occurring during such taxable year; and (2) ten percent of the amount determined under (1) multiplied by the number of whole calendar months between the end of the Participant's taxable year and the date of distribution,

counting the month of distribution if distribution occurs after the 15th of such month.

6.04 Actual Deferral Percentage Test.

(a) The Actual Deferral Percentage'(hereinafter "ADP") for participants who are Highly Compensated Employees for each Plan Year and the ADP for Participants who are Non-highly Compensated Employees for the same Plan Year must satisfy one of the following tests:

(i) The ADP for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the ADP for Participants who are Non-highly Compensated Employees for the same Plan Year multiplied by 1.25; or

(ii) The ADP for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the ADP for Participants who are Non-highly Compensated Employees for the same Plan Year multiplied by 2.0, provided that the ADP for Participants who are Highly Compensated Employees does not exceed the ADP for Participants who are Nonhighly Compensated Employees by more than two (2) percentage points.

(b) Special Rules:

(i) The ADP for any Participant who is a Highly Compensated Employee for the Plan Year and who is eligible to have Elective Deferrals (and Qualified Non-elective Contributions or Qualified Matching Contributions, or both, if treated as Elective Deferrals for purposes of the ADP test) allocated to his or her accounts under two or more arrangements described in

Section 401(k) of the Code, that are maintained by the Employer, shall be determined as if such Elective Deferrals (and, if applicable, such Qualified Non-elective Contributions or Qualified Matching Contributions, or both) were made under a single arrangement. If a Highly Compensated Employee participates in two or more cash or deferred arrangements that have different Plan Years, all cash or deferred arrangements ending with or within the same calendar year shall be treated as a single arrangement.

(ii) In the event that this Plan satisfies the requirements of Sections 401(k), 401(a)(4), or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such Sections of the Code only if aggregated with this Plan, then this Section shall be applied by determining the ADP of employees as if all such plans were a single plan. For Plan Years beginning after December 31, 1989, plans may be aggregated in order to satisfy Section 401(k) of the Code only if they have the same Plan Year.

(iii) For purposes of determining the ADP of a Participant who is a Five-Percent Owner or one of the ten most highly-paid Highly Compensated Employees, the Elective Deferrals (and Qualified Non-elective Contributions or Qualified Matching Contributions, or both, if treated as Elective Deferrals for purposes of the ADP test) and Compensation of such Participant shall include the Elective Deferrals (and, if applicable, qualified Non-elective Contributions and Qualified Matching Contributions, or both) and Compensation for the Plan Year of Family Members (as defined in Section 414(q)(6) of the Code). Family Members, with respect to such Highly Compensated Employees, shall be disregarded as separate Employees in determining

the ADP both for Participants who are Non-highly Compensated Employees and for Participants who are Highly Compensated Employees.

(iv) For purposes of determining the ADP test, Elective Deferrals, Qualified Non-elective Contributions and Qualified Matching Contributions must be made before the last day of the twelve-month period immediately following the Plan Year to which contributions relate.

(v) The Employer shall maintain records sufficient to demonstrate satisfaction of the ADP test and the amount of Qualified Non-elective Contributions or Qualified Matching Contributions, or both, used in such test.

(vi) The determination and treatment of the ADP amounts of any Participant shall satisfy such other requirements as may be prescribed by the Secretary of the Treasury.

(c) "Actual Deferral Percentage" shall mean, for a specified group of Participants for a Plan Year, the average of the ratios (calculated separately for each Participant in such group) of (1) the amount of Employer Contributions actually paid over to the Trust Fund on behalf of such Participant for the Plan Year to (2) the Participant's Compensation for such Plan Year (whether or not the Employee was a Participant for the entire Plan Year). Employer Contributions on behalf of any Participant shall include: (1) any Elective Deferrals made pursuant to the Participant's Salary Reduction Agreement, including Excess Elective Deferrals of Highly Compensated Employees, but excluding Elective Deferrals that are taken into account in the Contribution Percentage test (provided the ADP test is satisfied both with and without exclusion of these

Elective Deferrals): and (2) at the election of the Employer, Qualified Non-elective Contributions and Qualified Matching Contributions. For purposes of computing Actual Deferral Percentages, an Employee who would be a Participant but for the failure to make Elective Deferrals shall be treated as a Participant on whose behalf no Elective Deferrals are made.

6.05 Distribution of Excess Contributions.

Notwithstanding any other provision of this plan, Excess Contributions, plus any income and minus any loss allocable thereto, shall be distributed no later than the last day of each Plan Year to Participants to whose Accounts such Excess Contributions were allocated for the preceding Plan Year. If such excess amounts are distributed more than 2-1/2 months after the last day of the Plan Year in which such excess amounts arose, a ten (10) percent excise tax will be imposed on the Employer maintaining the Plan with respect to such amounts. Such distributions shall be made to Highly Compensated Employees on the basis of the respective portions of the Excess Contributions attributable to each of such Employees. Excess Contributions shall be allocated to Participants who are subject to the family member aggregation rules of Section 414(q)(6) of the Code in the manner prescribed by the regulations.

Excess Contributions (including the amounts recharacterized) shall be treated as Annual Additions under the Plan.

Determination of Income or Loss: Excess Contributions shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Contributions is the sum of: (1) income or loss allocable to the participant's Elective

Deferral Account (and, if applicable, the Qualified Non-elective Contribution account or the Qualified Matching Contributions account or both) for the Plan Year multiplied by a fraction, the numerator of which is such Participant's Excess Contributions for the year and the denominator is the Participant's Account balance, attributable to Elective Deferrals (and Qualified Non-elective Contributions or Qualified Matching Contributions, or both, if any of such contributions are included in the ADP test) without regard to any income or loss occurring during such Plan Year; and (2) ten percent of the amount determined under (1) multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.

Accounting for Excess Contributions: Excess Contributions shall be distributed from the Participant's Elective Deferral Account and Qualified Matching Contribution account (if applicable) in proportion to the Participant's Elective Deferrals and Qualified Matching Contributions (to the extent used in the ADP test) for the Plan Year. Excess Contributions shall be distributed from the Participant's Qualified Non-elective Contribution Account only to the extent that such Excess Contributions exceed the balance in the Participant's Elective Deferral Account and Qualified Matching Contribution Account.

"Excess Contributions" shall mean, with respect to any Plan Year, the excess of:

(a) The aggregate amount of Employer Contributions actually taken into account in computing the ADP of

Highly Compensated Employees for such Plan Year, over

(b) The maximum amount of such Contributions permitted by the ADP test (determined by reducing Contributions made on behalf of Highly Compensated Employees in order of the ADPs, beginning with the highest of such percentages).

6.06 Recharacterization.

If the Employer elects in Section 24, Item 7 of the Adoption Agreement to permit Employees to make Voluntary Nondeductible Contributions to the Plan, a Participant may treat his or her Excess Contributions as an amount distributed to the Participant and then contributed by the Participant to the Plan. Recharacterized amounts will remain nonforfeitable and subject to the same distribution requirements as Elective Deferrals. Amounts may not be recharacterized by a Highly Compensated Employee to the extent that such amount in combination with other Employee Contributions made by that Employee would exceed any stated limit under the plan on Employee Contributions.

Recharacterization must occur no later than two and one-half months after the last day of the Plan Year in which such Excess Contributions arose and is deemed to occur no earlier than the date the last Highly Compensated Employee is informed in writing of the amount recharacterized and the consequences thereof. Recharacterized amounts will be taxable to the Participant for the Participant's tax year in which the Participant would have received them in cash.

6.07 Voluntary Non-deductible Contributions.

If elected by the Employer in Section 24, Item 7 of the Adoption Agreement, Employees will be permitted to make Voluntary Non-deductible Contributions to the Plan. Voluntary Non-deductible Contributions shall be maintained in a separate Account pursuant to Section 5.01(b).

6.08 Matching Contributions.

If elected by the Employer in Section 24, Item 8 of the Adoption Agreement, the Employer will make Matching Contributions to the Plan. Matching Contributions will be maintained in a separate Account pursuant to Section 5.01(c).

6.09 Forfeitures and Vesting of Matching Contributions.

Matching Contributions shall be vested in accordance with Section 24, Item 9 of the Adoption Agreement. In any event, Matching Contributions shall be fully vested at Normal Retirement Age, upon the complete or partial termination of the profit-sharing plan, or upon the complete discontinuance of Employer Contributions.

Forfeitures of Matching Contributions, other than Excess Aggregate Contributions, shall be made in accordance with Section 5.04.

6.10 Qualified Matching Contributions.

If elected by the Employer in Section 24, Item 4 of the Adoption Agreement, the Employer will make Qualified Matching Contributions to the Plan.

"Qualified Matching Contributions" shall mean matching Contributions which are subject to the distribution and nonforfeitability requirements under Section 401(k) of the Code when made.

6.11 Limitations on Employee Contributions and Matching Contributions.

(a) The ACP for Participants who are Highly Compensated Employees for each Plan Year and the ACP for Participants who are Non-highly Compensated Employees for the same Plan Year must satisfy one of the following tests:

(i) The ACP for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the ACP for Participants who are Non-highly Compensated Employees for the same Plan Year multiplied by 1.25; or

(ii) The ACP for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the ACP for Participants who are Non-highly Compensated Employees for the same Plan Year multiplied by two (2), provided that the ACP for Participants who are Highly Compensated Employees does not exceed the ACP for Participants who are Non-highly Compensated Employees by more than two (2) percentage points.

(b) Special Rules:

(i) Multiple Use: If one or more Highly Compensated Employees participate in both a CODA and a plan subject to the ACP test maintained by the Employer and the sum of the ADP and ACP of those Highly Compensated Employees subject to either or both tests

exceeds the Aggregate Limit, then the ACP of those Highly Compensated Employees who also participate in a CODA will be reduced (beginning with such Highly Compensated Employee whose ACP is the highest) so that the limit is not exceeded. The amount by which each Highly Compensated Employee's Contribution. Percentage Amounts is reduced shall be treated as an Excess Aggregate Contribution. The ADP and ACP of the Highly Compensated Employees are determined after any corrections required to meet the ADP and ACP tests. Multiple use does not occur if either the ADP and ACP of the Highly Compensated Employees does not exceed 1.25 multiplied by the ADP and ACP of the Non-highly Compensated Employees.

(ii) For purposes of this Section, the Contribution Percentage for any Participant who is a Highly Compensated Employee and who is eligible to have Contribution Percentage Amounts allocated to his or her account under two or more plans described in Section 401(a). of the Code, or arrangements described in Section 401(k) of the Code that are maintained by the Employer, shall be determined as if the total of such Contribution Percentage Amounts was made under each plan. If a Highly Compensated Employee participates in two or more cash or deferred arrangements that have different plan years, all cash or deferred arrangements ending with or within the same calendar year shall be treated as a single arrangement.

(iii) In the event that this Plan satisfies the requirements of Sections 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this Plan, then this Section shall be applied by determining the Contribution 'Percentage

of employees as if all such plans were a single plan. For plan years beginning after December 31, 1989, plans may be aggregated in order to satisfy Section 401(m) of the Code only if they have the same plan year.

(iv) For purposes of determining the Contribution Percentage of a Participant who is a Five-Percent Owner or one of the ten most highly-paid Highly Compensated Employees, the Contribution Percentage Amounts and Compensation of such Participant shall include the Contribution Percentage Amounts and Compensation for the Plan Year of Family Members (as defined in Section 414(q)(6) of the Code). Family Members, with respect to Highly Compensated Employees, shall be disregarded as separate Employees in determining the Contribution Percentage both for Participants who are Non-highly Compensated Employees and for Participants who are Highly Compensated Employees.

(v) For purposes of determining the Contribution Percentage test, Employee Contributions are considered to have been made in the Plan Year in which contributed to the trust. Matching Contributions and Qualified Non-elective Contributions will be considered made for a Plan Year if made no later than the end of the twelve-month period beginning on the day after the close of the Plan Year.

(vi). The Employer shall maintain records sufficient to demonstrate satisfaction of the ACP test and the amount of Qualified Non-elective Contributions or Qualified Matching Contributions, or both, used in such test.

(vii) The determination and treatment of the Contribution Percentage of any Participant shall satisfy such other requirements as may be prescribed by the Secretary of the Treasury.

(c) Definitions:

(i) "Aggregate Limit" shall mean the sum of (1) 125 percent of the greater of the ADF of the Non-highly Compensated Employees for the Plan Year or the ACP of Non-highly Compensated Employees under the Plan subject to Section 401(m) of the Code for the Plan Year beginning with or within the Plan Year of the CODA and (2) the lesser of 200%, or two plus the lesser of such ADP or ACP. "Lesser" is substituted for "greater" in ("1"), above, and "greater" is substituted for "lesser" after "two plus the" in "(2)" if it would result in a larger Aggregate Limit.

(ii) "Average Contribution Percentage" shall mean the average of the Contribution Percentages of the Eligible Participants in a group.

(iii) "Contribution Percentage" shall mean the ratio (expressed as a percentage) of the Participant's Contribution Percentage Amounts to the Participant's Compensation for the Plan Year (whether or not the Employee was a Participant for the entire Plan Year).

(iv) "Contribution Percentage Amounts" shall mean the sum of the Employee Contributions, Matching Contributions, and Qualified Matching Contributions (to the extent not taken into account for purposes of the ADP test) made under the Plan on behalf of the Participant for the Plan Year. Such Contribution Percentage Amounts shall include Forfeitures of Excess Aggregate Contributions or Matching

Contributions allocated to the Participant's Account which shall be taken into account in the year in which such Forfeiture is allocated. If so elected in the Adoption Agreement the Employer may include Qualified Non-elective Contributions in the Contribution Percentage Amounts. The Employer also may elect to use Elective Deferrals in the Contribution Percentage Amounts so long as the A.DP test is met before the Elective Deferrals are used in the ACP test and continues to be met following the exclusion of those Elective Deferrals that are used to meet the ACP test.

(v) "Eligible Participant" shall mean any Employee who is eligible to make an Employee Contribution, or an Elective Deferral (if the Employer takes such Contributions into account in the calculation of the Contribution Percentage), or to receive a Matching Contribution (including Forfeitures) or a Qualified Matching Contribution. If an Employee Contribution is required as a condition of participation in the Plan, any Employee who would be a Participant in the Plan if such employee made such a contribution shall be treated as an eligible participant on behalf of whom no Employee Contributions are made.

(vi) "Employee Contribution" shall mean any contribution made to the Plan by or on behalf of a Participant that is included in the Participant's gross income in the year in which made and that is maintained under a separate account to which earnings and losses are allocated.

(vii) "Matching Contribution" shall mean an Employer Contribution made to this or any other defined contribution plan on behalf of a Participant on account of an Employee Contribution made by such Participant,

or on account of a Participant's Elective Deferral, under a plan maintained by the Employer.

6.12 Distribution of Excess Aggregate Contributions.

Notwithstanding any other provision of this Plan, Excess Aggregate Contributions, plus any income and minus any loss allocable thereto, shall be forfeited, if forfeitable, or if not forfeitable, distributed no later than the last day of each Plan Year to Participants to whose Accounts such Excess Aggregate Contributions were allocated for the preceding Plan Year. Excess Aggregate Contributions shall be allocated to Participants who are subject to the Family Member aggregation rules of Section 414(q)(6) of the Code in the manner prescribed by the regulations. If such Excess Aggregate Contributions are distributed more than 2-1/2 months after the last day of the Plan Year in which such excess amounts arose, a ten (10) percent Excise tax will be imposed on the Employer maintaining the Plan with respect to those amounts. Excess Aggregate Contributions shall be treated as Annual Additions under the Plan.

Determination of Income or Loss: Excess Aggregate Contributions shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Aggregate Contributions is the sum of: (a) income or loss allocable to the Participant's Voluntary Contributions Account, Matching Contributions Account (if any, and if all amounts therein are not used in the ADP test) and, if applicable, Qualified Non-elective Contribution Account and Elective Deferral Account for the Plan Year multiplied by a fraction, the numerator of which is such Participant's Excess Aggregate Contributions for the Year and the denominator is the Participant's Account

balances) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan Year; and (b) ten percent of the amount determined under (a) multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.

Forfeitures of Excess Aggregate Contributions: Forfeitures of Excess Aggregate Contributions may either be reallocated to the Accounts of Non-highly Compensated Employees or applied to reduce Employer Contributions, as elected by the Employer in Section 24, Item 10(d) of the Adoption Agreement.

Accounting for Excess Aggregate Contributions: Excess Aggregate Contributions shall be forfeited, if forfeitable or distributed on a pro-rata basis from the Participant's Voluntary Contributions Account, Matching Contributions Account, and Qualified Matching Contributions Account (and, if applicable, the Participant's Qualified Non-elective Contributions Account or Elective Deferral Account, or both).

"Excess Aggregate Contributions" shall mean, with respect to any Plan Year, the excess of:

(a) The aggregate Contribution Percentage Amounts taken into account in computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over

(b) The maximum Contribution Percentage Amounts permitted by the ACP test (determined by reducing contributions made on behalf of Highly Compensated

Employees in order of their Contribution Percentages beginning with the highest of such percentages).

Such determination shall be made after first determining Excess Elective Deferrals pursuant to Section 6.03 and then determining Excess Contributions pursuant to Section 6.05.

6.13 Qualified Non-elective Contributions.

The Employer may elect to make Qualified Non-elective Contributions under the Plan on behalf of Employees as provided in Section 24, Item 3 of the Adoption Agreement.

In addition, in lieu of distributing Excess Contributions as provided in Section 6.05, or Excess Aggregate Contributions as provided in Section 6.12 of the Plan, and to the extent elected by the Employer in Section 24, Item 3 of the Adoption Agreement, the Employer may make Qualified Non-elective Contributions on behalf of Non-highly Compensated Employees that are sufficient to satisfy either the Actual Deferral Percentage test or the Average Contribution Percentage test, or both, pursuant to regulations under the Code.

"Qualified Non-elective Contributions" shall mean contributions (other than Matching Contributions or Qualified Matching Contributions) made by the Employer and allocated to Participants' Accounts that the Participants may 'not elect to receive in cash until distributed from the Plan; that are nonforfeitable when made; and that are distributable only in accordance with the distribution provisions that are applicable to Elective Deferrals and Qualified Matching Contributions.

6.14 Nonforfeitability and Vesting.

The Participant's accrued benefit derived from Elective Deferrals, Qualified Non-elective Contributions, Employee Contributions, and Qualified Matching Contributions is nonforfeitable. Separate Accounts for Elective Deferrals, Qualified Non-elective Contributions, Employee Contributions, Matching Contributions, and Qualified Matching Contributions will be maintained for each Participant. Each Account will be credited with the applicable contributions and earnings thereon.

6.15 Distribution Requirements.

Elective Deferrals, Qualified Non-elective Contributions, and Qualified Matching Contributions, and income allocable to each are not distributable to a Participant or his or her Beneficiary or Beneficiaries, in accordance with such Participant's or Beneficiary or Beneficiaries election, earlier than Termination of Employment, death, or Disability.

Such amounts may also be distributed upon:

(a) Termination of the Plan without the establishment of another defined contribution plan.

(b) The disposition by a corporation to an unrelated corporation of substantially all of the assets (within the meaning of Section 409(d)(2) of the Code) used in a trade or business of such corporation if such corporation continues to maintain this Plan after the disposition, but only with respect to Employees who continue employment with the corporation acquiring such assets.

(c) The disposition by a corporation to an unrelated entity of such corporation's interest in a subsidiary (within the meaning of Section 409(d)(3) of the Code) if such corporation continues to maintain this Plan, but only with respect to Employees who continue employment with such subsidiary.

(d) The attainment of age 59-1/2 in the case of a profit-sharing plan.

(e) The hardship of the participant as described in Section 6.15.

All distributions that may be made pursuant to one or more of the foregoing distributable events are subject to the spousal and Participant consent requirements (if applicable) contained in Sections 401(a)(11) and 417 of the Code.

6.16 Hardship Distribution.

Distribution of Elective Deferrals (and earnings thereon accrued as of December 31, 1988) may be made to a Participant in the event of hardship. For the purposes of this Section, hardship is defined as an immediate and heavy financial need of the Employee where such Employee lacks other available resources. Hardship distributions are subject to the spousal consent requirements contained in Sections 401(a)(11) and 417 of the Code.

Special Rules:

(a) The following are the only financial needs considered immediate and heavy: deductible medical expenses (within the meaning of Section 213(d) of the Code) of the Employee, the Employee's Spouse,

children, or dependents; the purchase (excluding mortgage payments) of a principal residence for the Employee; payment of tuition for the next quarter or semester of postsecondary education for the Employee, the Employee's Spouse, children or dependents; or the need to prevent the eviction of the Employee from, or a foreclosure on the mortgage of, the Employee's principal residence.

(b) A distribution will be considered as necessary to satisfy an immediate and heavy financial need of the Employee only if:

(i) The Employee has obtained all distributions, other than hardship distributions, and all nontaxable loans under all plans maintained by the Employer;

(ii) All plans maintained by the Employer provide that the Employee's Elective Deferrals (and Employee Contributions) will be suspended for twelve months after the receipt of the hardship distribution;

(iii) The distribution is not in excess of the amount of an immediate and heavy financial need; and

(iv) All plans maintained by the Employer provide that the Employee may not make Elective Deferrals for the Employee's taxable year immediately following the taxable year of the hardship distribution in excess of the applicable limit under Section 402(g) of the Code for such taxable year less the amount of such Employee's Elective Deferrals for the taxable year of the hardship distribution.

6.17 Top-Heavy Requirements.

Neither Elective Deferrals nor Matching Contributions may be taken into account for the purpose of satisfying the minimum top-heavy contribution requirement.

ARTICLE 7

RETIREMENT BENEFITS

7.01 Normal Retirement.

Each Participant shall be eligible to retire on his Normal Retirement Date. Such Participant's Account balance shall be paid in accordance with ARTICLES 10 and 11. Notwithstanding the other requirements of this Plan, a Participant who attains his Normal Retirement Age may retire on his Normal Retirement Date or may elect to continue in Service subject to the Employer's retirement policy, if any, and the provisions of the Age Discrimination in Employment Act of 1986. If such Participant continues in Service, then he shall be eligible to continue in all respects as a Participant in the Plan until his actual retirement. Subject to Section 10.07, no retirement benefit shall be payable until actual retirement unless such Participant who could take normal retirement requests that his retirement benefits commence before his actual retirement. In such case, the Committee shall direct the Trustee to commence payment of retirement benefits as soon as practicable following such request.

7.02 Early Retirement.

If a Participant's Termination of Employment occurs before the Participant attains his Normal Retirement Age, but after he has attained his Early Retirement Age as set forth in Section 13(b) of the Adoption Agreement, if applicable, and he has completed the required Years of Service set forth in such Section, if any, the Participant shall be entitled to an Early Retirement Benefit equal to the value of his Accounts.

If the Employer elected both an age and Service requirement for Early Retirement in Section 13 of the Adoption Agreement and a Participant's Termination of Employment occurs before he satisfies the age requirement for Early Retirement, but after he satisfies the Service requirement, the Participant will be entitled to elect an Early Retirement Benefit upon satisfaction of such age requirement. Such Account balance shall be paid in accordance with ARTICLES 10 and 11.

7.03 Disability Retirement.

A Participant who has incurred a Disability shall be eligible to retire on the first day of the month next following the Employer's determination of the Employee's Disability. Notwithstanding the vesting schedule elected by the Employer in Section 11 of the Adoption Agreement, an Employee's right to his or her Account balance shall be nonforfeitable in the event of Disability. Such Account balance shall be paid in accordance with ARTICLES 10 and 11.

ARTICLE 8

DEATH BENEFITS

8.01 Death Benefit.

In the event of the death of a Participant before his retirement, as provided in ARTICLE 7, or other Termination of Employment prior to any distribution to him of his Accounts, 100 percent of the balance of the Participant's Accounts shall be paid as provided below, less any amounts to be paid pursuant to ARTICLE 11:

(a) If the Plan is a profit-sharing plan, then, at the direction of the Committee, the Trustee shall pay the death benefit pursuant to Section 10.10 to the deceased Participant's surviving Spouse unless there is a Qualified Election, as defined in Section 11.04(c), and, in that case, to the party or parties designated as Beneficiary.

(b) If the Plan is a money purchase pension plan, then the Trustee shall pay the death benefit pursuant to Section 10.10.

8.02 Insured Death Benefit.

An additional Death Benefit may be provided through the purchase of life insurance policies if, and as, so provided in Section 18 of the Adoption Agreement.

(a) Governing Provisions. The following provisions shall govern the purchase and administration of life insurance policies hereunder:

(i) Each Participant may request the Employer to purchase ordinary life, term or universal life insurance policies on his life as follows:

(1) Ordinary life - For purposes of these incidental insurance provisions, ordinary life insurance contracts are contracts with both nondecreasing death benefits and nonincreasing premiums. If such contracts are purchased, less than 1/2 of the aggregate Employer Contributions allocated to any Participant will be used to pay the premiums attributable to them.

(2) Term and universal life - No more than 1/4 of the aggregate Employer Contributions allocated to any Participant will be used to pay the premiums on term life insurance contracts, universal life insurance contracts, and all other life insurance contracts which are not ordinary life.

(3) Combination - The sum of 1/2 of the ordinary life insurance premiums and all other life insurance premiums will not exceed 1/4 of the aggregate Employer Contributions allocated to any Participant.

(ii) Subject' to ARTICLE 11, the contracts on a Participant's life will be converted to cash or an annuity or distributed to the Participant upon commencement of benefits.

(iii) The Trustee shall apply for and will be the owner of any insurance contract purchased under the terms of this Plan. The insurance contract(s) must provide that proceeds will be payable to the Trustee, however the Trustee shall be required to pay over all proceeds of the contract(s) to the Participant's designated Beneficiary in accordance with the distribution provisions of this Plan. A Participant's Spouse will be

the designated Beneficiary of the proceeds in all circumstances unless a Qualified Election has been made in accordance with Section 11.04(c), if applicable. Under no circumstances shall the Trust Fund retain any part of the proceeds. In the event of any conflict between the terms of this Plan and the terms of any insurance contract purchased hereunder, the Plan provisions shall control.

(iv) Any dividends or credits earned on life insurance policies will be allocated to the Accounts derived from Employer Contributions for whose benefit the policy is held to reduce premium payments.

(v) Policies shall be purchased for a Participant only if he provides such evidence of insurability as may be required by the insurer. If he is not insurable at standard rates, the policy purchased shall be for such face amount as can be provided by the amount of premium which would have been paid if the Participant had been insurable at standard rates. If the Participant is uninsurable, then no policies shall be purchased.

(vi) Additional life insurance policies shall be purchased as of any premium due date only if the face amount of each additional policy will be at least $1,000.

(vii) Upon a Participant's Termination of Employment other than by death or Normal, Early 'or Disability Retirement, any nonvested portion of the cash value of any life insurance policy shall be subject to Forfeiture and treated in the manner provided in Section 5.04 hereof.

(b) Vesting and Disposition of Policies.

(i) If there are no Employee Contributions, the cash value of any life insurance policies issued on the life of a Participant shall be vested as provided in Section 11 of the Adoption Agreement, but the Trustee shall offer the policies to the Participant upon his Termination of Employment for any reason other than death or retirement in exchange for an amount equal to the nonvested portion of the total cash value of the policies, if such amount is paid to the Trustee within 30 days of the date such policies are offered to the Participant. Subject to the requirements of ARTICLE 11, if the policies are distributed to him upon his Termination of Employment without payment by the Participant of the nonvested portion of the cash value thereof, such portion shall be charged to the Participant's Employer Contributions Account.

(ii) If there are Employee Contributions, the portion of the cash value of any life insurance policies which is attributable to Employee Contributions shall be 100 percent vested. The portion attributable to Employee Contributions shall be equal to the percentage of said cash value which equals (1) the sum of Employee Contributions applied to the payment of premiums on said policies divided by (2) the total premiums paid on said policies. The balance of the cash value of the life insurance policies which is attributable to the Employer Contributions shall be vested as provided in Section 11 of the Adoption Agreement. The Trustee shall offer the policies to the Participant upon his Termination of Employment for any reason other than death or retirement in exchange for an amount equal to the total nonvested portion of the cash value of the policies, if such amount is paid to the Trustee within a reasonable time after the date of his Termination of Employment. Subject to the provisions of ARTICLE 11, if the policies are distributed to him upon his

Termination of Employment without payment by the Participant of the nonvested portion of the cash value thereof, such portion shall be charged to the Participant's Employer Contributions Account.

(iii) Any policies on the life of a Participant, the premiums for which have been paid entirely by Employee Contributions, shall be vested in him upon Termination of Employment and shall be in addition to all other benefits provided by the Plan.

ARTICLE 9

BENEFITS ON SEPARATION FROM SERVICE

9.01 Vested Benefit.

(a) If at a Participant's Termination of Employment for reasons other than on account of his death he then does not become entitled to a benefit under ARTICLE 7, he may be entitled to a Vested Benefit under this Section. Such Vested Benefit shall be equal to the nonforfeitable percentage of his Employer derived Account balance determined in accordance with the vesting schedule selected in Section 11 of the Adoption Agreement. Notwithstanding such vesting schedule, an Employee's right to his or her other Account balances shall be nonforfeitable upon the attainment of Normal Retirement Age. Employee-derived Account balances shall be nonforfeitable at all times.

(b) In the case of a Participant who has five (5) or more consecutive one (1) year Breaks in Service, all Years of Service after such Breaks in Service will be disregarded for the purpose of vesting the Employer-derived Account balance that accrued before such Breaks in Service. Such Participant's pre-break Service will count in resting the post-break Employer-derived Account balance only if either:

(i) such Participant has any nonforfeitable interest in the Account balance attributable to Employer Contributions at the time of Termination of Employment; or

(ii) upon returning to Service the number of consecutive one (1) year Breaks in Service is less than the number of Years of Service.

Separate Accounts will be maintained for the Participant's pre-break and post-break Employer-derived Account balance. Both Accounts will share in the earnings and losses of the Trust Fund.

9.02 Forfeitures.

If a Participant incurs a Termination of Employment, the non-vested portion of the Participant's Employer Account or Matching Account, pursuant to Section 9.01, shall be forfeited on the earlier of the following dates:

(a) the date the Participant receives a distribution of the entire vested balance of such Accounts, pursuant to ARTICLE 10; or

(b) the date the Participant incurs his fifth consecutive one-year Break in Service.

ARTICLE 10

PAYMENT OF BENEFITS

10.01 Payment of Benefits.

(a) The determination as to the value of an Account with respect to any benefit hereunder to which a Participant, Retired Participant or Beneficiary shall have become entitled shall be based on the balance in the Account on the Allocation Date preceding the date benefits are paid or commence to be paid, plus contributions allocated to his Account after such Allocation Date, less any payments from such Account since such Allocation Date.

(b) Before payment of any benefit hereunder, written application therefore shall be made by the Participant or Beneficiary, as the case may be, and submitted to the Employer in such form and manner as the Employer shall uniformly prescribe. Any payment made in accordance with the provisions of the Plan to a Participant or Beneficiary, or to their legal representative shall, to the extent of the method of computation as well as the amount thereof, constitute full satisfaction of all claims hereunder against the Trustee, the Administrator and the Employer, any of whom may require such Participant, Beneficiary or legal representative, as a condition precedent to such payment, to execute a receipt and release therefor in such form as shall be determined by the Trustee, the Administrator or the Employer, as the case may be. In the event any benefits are distributed in the form of annuity contracts, any such contract or contracts shall be endorsed as nontransferable.

10.02 Time of Payment.

Payment of benefits under the Plan shall commence in accordance with the following:

(a) Payment of benefits provided in ARTICLE 7 or ARTICLE 8 shall commence after the value of the Participant's Accounts shall have been determined following the date the Participant is eligible to receive such benefits.

(b) Payment of benefits provided in Section 7.03 or ARTICLE 9 shall commence at the time selected by the Employer pursuant to Section 13(d) of the Adoption Agreement.

(c) Notwithstanding the foregoing, unless the Participant elects otherwise, distribution of benefits will begin no later than the 60th day after the latest of the close of the Plan Year in which:

(i) the Participant attains age 65 (or Normal Retirement Age, if earlier);

(ii) occurs the 10th anniversary of the year in which the Participant commenced participation in the Plan; or,

(iii) occurs the Participant's Termination of Employment.

Notwithstanding the foregoing, the failure of a Participant and Spouse to consent to a distribution while a benefit is immediately distributable, within the meaning of Section 10.03, shall be deemed to be an election to defer commencement of payment of any benefit sufficient to satisfy this Section.

10.03 Restrictions on Immediate Distribution.

(a) If the value of a Participant's vested Account balance derived from Employer and Employee Contributions exceeds (or at the time of any prior distribution exceeded) $3,500, and the Account balance is immediately distributable, the Participant and the Participant's Spouse (or where either the Participant or the Spouse has died, the survivor) must consent to any distribution of such Account balance. The consent of the Participant and the Participant's Spouse shall be obtained in writing within the 90-day period ending on the Annuity Starting Date. The Annuity Starting Date is the first day. of the first period for which an amount is paid as an annuity or any other form. The Administrator shall notify the Participant and the Participant's Spouse of the right to defer any distribution until the Participant's Account balance is no longer immediately distributable. Such notification shall include a general description of the material features, and an explanation of the relative values. of, the optional forms of benefit available under the Plan in a manner that would satisfy the notice requirements of Section 417(a)(3) of the Code, and shall be provided no less than 30 days and no more than 90 days prior to the Annuity Starting Date.

(b) Notwithstanding the foregoing, only the Participant need consent to the commencement of a distribution in the form of a Qualified Joint and Survivor Annuity while the Account balance is immediately distributable. (Furthermore, if payment in the form of a Qualified Joint and Survivor Annuity is not required with respect to the Participant pursuant to Section 11.06 of the Plan, only the Participant need consent to the distribution of an Account balance that is immediately distributable.) Neither the consent of the Participant nor the Partici-

pant's Spouse shall be required to the extent that a distribution is required to satisfy Section 401(a)(9) or 415 of the Code. In addition, upon termination of this Plan if the Plan does not offer an annuity option (purchased from a commercial provider), the Participant's Account balance may, without the Participant's consent, be distributed to the Participant or transferred to another defined contribution plan (other than an employee stock ownership plan as defined in Section 4975(e)(7) of the Code) within the same controlled group.

An Account balance is immediately distributable if any part of the Account balance could be distributed to the Participant (or surviving Spouse) before the Participant attains or would have attained if not deceased) the later of Normal Retirement Age or age 62.

(c) For purposes of determining the applicability of the foregoing consent requirements to distributions made before the first day of the first Plan Year beginning after December 31, 1988, the Participant's vested Account balance shall not include amounts attributable to accumulated Deductible Contributions within the meaning of Section 72(o)(5)(B) of the Code.

10.04 Termination of Employment Prior to Early Retirement.

(a) If, at an Employee's Termination of Employment, the value of the Employee's vested Account balance derived from Employer and Employee Contributions is not greater than $3,500, the Employee will receive a distribution of the value of the entire vested portion of such Account balance and the nonvested portion will be treated as a Forfeiture. For purposes of this Section, if the value of an Employee's vested Account balance is

zero, the Employee shall be deemed to have received a distribution of such vested Account balance. A Participant's vested Account balance shall not include accumulated Deductible Contributions within the meaning of Section 72(o)(5)(B) of the Code for Plan Years beginning prior to January 1, 1989.

(b) If, at an Employee's Termination of Employment, the Employee elects, in accordance with the requirements of Section 10.03, to receive the value of his vested Account balance, the nonvested portion will be treated as a Forfeiture. If the Employee elects to have distributed less than the entire vested portion of the Account balance derived from Employer Contributions, the part of the nonvested portion that will be treated as a Forfeiture is the total nonvested portion multiplied by a fraction, the numerator of which is the 'amount of the distribution attributable to Employer Contributions and the denominator of which is the total value of the vested Employer derived Account balance.

(c) If an Employee receives a distribution pursuant to this Section and the Employee resumes employment covered under this Plan, the Employee's Employer-derived Account balance will be restored to the amount on the date of distribution if the Employee repays to the Plan the full amount of the distribution attributable to Employer Contributions before the earlier of 5 years after the first date on which the Participant is subsequently reemployed by the Employer, or the date the Participant incurs 5 consecutive 1-year Breaks in Service following the date of the distribution. If an Employee is deemed to receive a distribution pursuant to this Section, and the Employee resumes employment covered under this Plan before the date the Participant incurs 5 consecutive 1-year Breaks in Service, upon the

reemployment of such Employee, the Employer-derived Account balance of the Employee will be restored to the amount on the date of such deemed contribution.

10.05 Withdrawal from Employer Account (Non-Integrated Profit-Sharing Plans Only).

(a) The Administrator of a non-integrated profit-sharing plan may adopt a policy which allows a Participant to withdraw all or any part of his vested interest from his Employer Contributions Account and/or his Rollover Account; provided, however, that the policy shall allow withdrawals only:

(i) from monies that have been in the Plan for at least two years, or

(ii) if the Participant has financial need due to a hardship.

(b) In the event the Administrator adopts a withdrawal policy, it shall be communicated to all Participants and shall allow withdrawals in a uniform, non-discriminatory manner. If the policy allows withdrawals for hardships, it may include, but is not limited to, expenses incurred by the Participant for:

(i) education, illness, medical treatment or hospitalization for the Participant, his Spouse, their respective parents or dependent children,

(ii) the purchase of a home,

(iii) a casualty loss, or

(iv) an unexpected or unusual expense.

(c) In the event the Administrator adopts a policy allowing withdrawals, and a Participant withdraws funds from his Employer Contributions Account which are less than 100 percent vested at the time of withdrawal, the Committee shall establish a separate Account for the Participant and the Participant's vested portion of the separate Account shall not at any relevant time be less than an account ("X") determined by the formula: X = P(AB = (R x D)) - (R x D). For purposes of applying the formula, P is the vested percentage at the relevant time; D is the amount of the distributions; R is the ratio of the Account balance at the relevant time to the Account balance after withdrawal; and the relevant time is the time at which, under the Plan, the vested percentage in the Account cannot increase.

10.06 Distribution Requirements.

(a) Subject to ARTICLE 11, the requirements of this Section shall apply to any distribution of a Participant's interest and will take precedence over any inconsistent provisions of this Plan. Unless otherwise specified, the provisions of this Section apply to calendar years beginning after December 31, 1984.

(b) All distributions required under this Section shall be determined and made in accordance with the Proposed Regulations under Section 401(a)(9) of the Code, including the minimum distribution incidental benefit requirement of Section 1.401(x)(9)-2 of the Proposed Regulations.

(c) Except as provided in subsection (d), the Participant shall, subject to the requirements of ARTICLE 11, select the method of payment of benefits from his

Accounts. The optional forms of benefit provided by this Plan are as follows: . (i) a lump-sum distribution, (ii) substantially equal, periodic, monthly, quarterly, semi-annual or annual installments over a period not exceeding the life expectancy of the Participant or the life expectancy of the Participant and his designated Beneficiary, or (iii) the purchase of a single premium non-transferable annuity contract from a life insurance company, or (iv) in the case of a profit-sharing plan, non-periodic installments to the extent this method complies with Section 401(x)(9) of the Code and Regulations thereunder; provided, however, that if the contract provides for continuance of annuity payments after a Participant's death to a Beneficiary other than the Participant's Spouse, the value of such death benefit shall be less than the value of the Participant's annuity.

(d) In the case of a profit-sharing plan or distribution that meets the safe-harbor requirements pursuant to Section 11.06, the optional forms of benefit provided by this Plan are as follows: (i) a lump-sum distribution, (ii) substantially equal, periodic, monthly, quarterly, semi-annual or annual installments over a period not exceeding the life expectancy of the Participant or the life expectancy of the Participant and his designated Beneficiary, or (iii) non-periodic installments to the extent this method complies with Section 401(a)(9) of the Code and Regulations thereunder.

If the Participant elects to receive his benefits over a period in excess of the Participant's then life expectancy, the then present value of the payments to be made over the period of the Participant's then life expectancy must be more than 50 percent of the then

present value of the total payments to be made to the Participant and his Beneficiary.

10.07 Required Beginning Date.

The entire interest of a participant must be distributed or begin to be distributed no later than the Participant's Required Beginning Date (defined below).

10.08 Limits on Distribution Periods.

As of the first Distribution Calendar Year (defined below), distributions, if not made in a single-sum,. may only be made over one of the following periods (or a combination thereof):

(a) the life of the Participant,

(b) the life of the Participant and a designated Beneficiary,

(c) a period certain not extending beyond the life expectancy of the Participant, or

(d) a period certain not extending beyond the joint and last survivor expectancy of the Participant and a designated Beneficiary.

10.09 Determination of Amount to be Distributed Each Year.

If the Participant's interest is to be distributed in other than a single sum, the following minimum distribution rules shall apply on or after the Required Beginning Date:

(a) Individual account.

(i) If a Participant's benefit is' to be distributed over (1) a period not extending beyond the Life Expectancy (defined below) of the Participant or the joint life and last survivor expectancy of the Participant and the Participant's designated Beneficiary or (2) a period not extending beyond the Life Expectancy of the designated Beneficiary, the amount required to be distributed for each calendar year, beginning with distributions for the first Distribution Calendar Year, must at least equal the quotient obtained by dividing the Participant's benefit by the applicable Life Expectancy.

(ii) For calendar years beginning before January 1, 1989, if the Participant's Spouse is not the designated Beneficiary, the method of distribution selected must assure that at least fifty (50) percent of the present value of the amount available for distribution is paid within the Life Expectancy of the Participant.

(iii) For calendar years beginning after December 31, 1988, the amount to be distributed each year, beginning with distributions for the first Distribution Calendar Year shall not be less than the quotient obtained by dividing the Participant's benefit by the lesser of (1) the Applicable Life Expectancy or (2) if the Participant's Spouse is not the designated Beneficiary, the applicable divisor determined from the table set forth in Q&A-4 of Section 1.401(a) (9)-2 of the Proposed Income Tax Regulations. Distributions after the death of the Participant shall be distributed using the applicable Life Expectancy in subsection (i) as the relevant divisor without regard to Regulations Section 1.401(a)(9)-2.

(iv) The minimum distribution required for the Participant's first Distribution Calendar Year must be made on or before the Participant's Required Beginning Date. The minimum distribution for other calendar years, including the minimum distribution for the Distribution Calendar Year in which the Employee's Required Beginning Date occurs, must be made on or before December 31 of that Distribution Calendar Year.

(b) Other forms. If the Participant's benefit is distributed in the form of an annuity purchased from an insurance company, distributions thereunder shall be made in accordance with the requirements of Section 401(a)(9) of the Code and the proposed regulations thereunder.

10.10 Death Distribution Provisions.

(a) Distribution beginning before death. If the Participant dies after distribution of his or her interest has begun, the remaining portion of such interest will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death.

(b) Distribution beginning after death. If the Participant dies before distribution of his or her interest begins, distribution of the Participant's entire interest shall be completed by December 31 of the calendar year containing the fifth anniversary of the Participant's death except to the extent that an election is made to receive distributions in accordance with (i) or (ii) below:

(i) if any portion of the Participant's interest is payable to a designated Beneficiary, distributions may be made

over the life or over a period certain not greater than the Life Expectancy of the designated Beneficiary commencing on or before December 31 of the calendar year immediately following the calendar year in which the Participant died,

(ii) if the designated Beneficiary is the Participant's surviving Spouse, the date distributions are required to begin in accordance with (i) above shall not be earlier than the later of (1) December 31 of the calendar year immediately following the calendar year in which the Participant died and (2) December 31 of the calendar year in which the Participant would have attained age 70-1/2.

If the Participant has not made. an election pursuant to this subsection (b) by the time of his or her death, the Participant's designated Beneficiary must elect the method of distribution no later than the earlier of (A) December 31 of the calendar year in which distributions would be required to begin under this Section, or (B) December 31 of the calendar year which contains the fifth anniversary of the date of death of the Participant. If the Participant has no designated Beneficiary, or if the designated Beneficiary does not elect a method of distribution, distribution of the Participant's entire interest must be completed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.

(c) For, purposes of subsection (b), if the surviving Spouse dies after the Participant, but before payments to such Spouse begin, the provisions of subsection (b), with the exception of paragraph (ii) therein, shall be applied as if the surviving Spouse were the Participant.

(d) For purposes of this Section 10.10, any amount paid to a child of the Participant will be treated as if it had been paid to the surviving Spouse if the amount becomes payable to the surviving Spouse when the child reaches the age of majority.

(e) For the purposes of this Section 10.10, distribution of a Participant's interest is considered to begin on the Participant's Required Beginning Date (or, if subsection (c) is applicable, the date distribution is required to begin to the surviving Spouse pursuant to subsection (b)). If distribution in the form of an annuity irrevocably commences to the Participant before the Required Beginning Date, the date distribution is considered to begin is the date distribution actually commences.

10.11 Definitions.

(a) Applicable Life Expectancy: The Life Expectancy (or joint and last survivor expectancy) calculated using the attained age of the Participant (or designated Beneficiary) as of the Participant's (or designated Beneficiary's) birthday in the applicable calendar year reduced by one for each calendar year which has elapsed since the date Life Expectancy was first calculated. If Life Expectancy is being recalculated, the applicable Life Expectancy shall be the life expectancy as so recalculated. The applicable calendar year shall be the first Distribution Calendar Year, and if Life Expectancy is being recalculated such succeeding calendar year.

(b) Designated Beneficiary: The individual who is designated as the Beneficiary under the Plan in accordance with Section 401(a)(9) of the Code and the regulations thereunder.

(c) Distribution Calendar Year: A calendar year for which a minimum distribution is required. For distributions beginning before the Participant's death, the first Distribution Calendar Year is the calendar year immediately preceding the calendar year which contains the Participant's Required Beginning Date. For distributions beginning after the Participant's death, the first Distribution Calendar Year is the calendar year in which distributions are required to begin pursuant to Section 10.10.

(d) Life Expectancy: Life Expectancy and Joint and last survivor expectancy are computed by use of the expected return multiples in Tables V and VI of Section 1.72-9 of the Income Tax Regulations.

Unless otherwise elected by the Participant (or Spouse, in the case of distributions described in Section 10.10-(b)(ii)) by the time distributions are required to begin, Life Expectancies shall be recalculated annually. Such election shall be irrevocable as to the Participant (or Spouse) and shall apply to all subsequent years. The Life Expectancy of a nonspouse Beneficiary may not be recalculated.

(e) Participant's benefit.

(i) The account balance as of the last Allocation Date in the calendar year immediately preceding the Distribution Calendar Year (Allocation Calendar Year) increased by the amount of any Contributions or Forfeitures allocated to the Account balance as of dates in the Allocation Calendar Year after the Allocation Date and decreased by distributions made in the Allocation Calendar Year after the Allocation Date.

(ii) Exception for second Distribution Calendar Year. For purposes of paragraph (i), if any portion of the minimum distribution for the first Distribution Calendar Year. is made in the second Distribution Calendar Year on or before the Required Beginning Date, the amount of the minimum distribution made in the second Distribution Calendar Year shall be treated as if it had been made in the immediately preceding Distribution Calendar Year.

(f) Required Beginning Date.

(i) General rule. The Required Beginning Date of a Participant is the first day of April of the calendar year following the calendar year in which the Participant attains age 70-1/2.

(ii) Transitional rules. The Required Beginning Date of a Participant who attains age 70-1/2 before January 1, 1988, shall be determined in accordance with (1) or (2) below:

(1) Non-Five-Percent Owners. The Required Beginning Date of a Participant who is not a Five-Percent owner is the first day of April of the calendar year following the calendar year in which the later of retirement or attainment of age 70-1/2 occurs.

(2) Five-Percent Owners. The Required Beginning Date of a Participant who is a Five-Percent Owner during any year beginning after December 31, 1979, is the first day of April following the later of:

(A) the calendar year in which the Participant attains age 70-1/2, or

(B) the earlier of the calendar year with or within which ends the Plan Year in which the Participant becomes a Five-Percent Owner, or the calendar year in which the Participant retires.

The Required Beginning Date of a Participant who is not a Five-Percent owner who attains age 70-1/2 during 1988 and who has not retired as of January 1, 1989, is April 1, 1990.

(iii) Five-Percent Owner. A Participant is treated as a Five-Percent Owner for purposes of this Section if such Participant is a Five-Percent Owner as defined in Section 416(1) of the Code (determined in accordance with Section 416 of the Code but without regard to whether the Plan is Top-Heavy) at any time during the Plan Year ending with or within the calendar year in which such Five-Percent Owner attains age 66-1/2 or any subsequent Plan Year.

(iv) Once distributions have begun to a FivePercent Owner under this Section, they must continue to be distributed, even if the Participant ceases to be a Five-Percent Owner in a subsequent year.

10.12 Transitional Rule.

(a) Notwithstanding the other requirements of this ARTICLE and subject to the requirements of ARTICLE 11, distribution on behalf of any Employee, including a Five-Percent Owner, may be made in accordance with all of the following requirements (regardless of when such distribution commences):

(i) The distribution by the trust is one which would not have disqualified such trust under Section 401(a) (9) of

the Code as in effect prior to amendment by the Deficit Reduction Act of 1984.

(ii) The distribution is in accordance with a method of distribution designated by the Employee whose interest in the trust is being distributed or, if the Employee is deceased, by a Beneficiary of such Employee.

(iii) Such designation was in writing, was signed by the Employee or the Beneficiary, and was made before January 1, 1984.

(iv) The Employee had accrued a benefit under the Plan as of December 31, 1983.

(v) The method of distribution designated by the Employee or the Beneficiary specifies the time at which distribution will commence, the period over which distributions will be made, and in the case of any distribution upon the Employee's death, the Beneficiaries of the Employee listed in order of priority.

(b) A distribution upon death will not be covered by this transitional rule unless the information in the designation contains the required information described above with respect to the distributions to be made upon the death of the Employee.

(c) For any distribution which commences before January 1, 1984, but continues after December 31, 1983, the Employee, or the Beneficiary, to whom such distribution is being made, will be presumed to have designated the method of distribution under which the distribution is being made if the method of distribution

was specified in writing and the distribution satisfies the requirements in subsections (a)(i) and (v).

(d) If a designation is revoked any subsequent distribution must satisfy the requirements of Section 401(a)(9) of the Code and the proposed regulations thereunder. If a designation is revoke d subsequent to the date distributions are required to begin, the trust must distribute by the end of the calendar year following the calendar year in which the revocation occurs the total amount not yet distributed which would have been required to have been distributed to satisfy Section 401(a)(9) of the Code and the proposed regulations thereunder, but for the Section 242(b)(2) election. For calendar years beginning after December 31, 1988, such distributions must meet the minimum distribution incidental benefit requirements in Section 1.401(a)(9)-2 of the proposed regulations. Any changes in the designation will be considered to be a revocation of the designation. However, the mere substitution or addition of another Beneficiary (one not named in the designation) under the designation will not be considered to be a revocation of the designation, so long as such substitution or addition does not alter the period over which distributions are to be made under the designation, directly or indirectly (for example, by altering the relevant measuring life). In the case in which an amount is transferred or rolled over from. one plan to another plan, the rules in Q&A J-2 and Q&A J-3 shall apply.

10.13 Failure to Locate.

If the Participant br Beneficiary to whom benefits are to be distributed cannot be located, and reasonable efforts have been made to find him, including the sending of notification by certified or registered mail to

his last known address, the Administrator may direct the Trustee to treat the benefits as a Forfeiture for the Plan Year in which the benefit is no longer immediately distributable (after the Participant attains the later of (i) Normal Retirement Age or (ii) age 62), provided, however, that if a benefit is forfeited pursuant to this Section 10.13, such benefit will be reinstated if a claim is made by the Participant or Beneficiary.

10.14 Premature Distributions.

Any distribution to a Participant shall be considered premature, and an additional income tax shall be imposed which is equal to ten percent of the amount which is includible in the Participant's gross income, unless the distribution is:

(a) made on or after the date on which the Participant attains age 59-1/2;

(b) made to a Beneficiary of the Participant after the Participant's death and pursuant to ARTICLE 8;

(c) made to the Participant due to his Disability;

(d) made in a series of substantially equal periodic payments (not less frequently than annually) for the life (or life expectancy) of the Participant or the joint lives (or joint life expectancies) of the Participant and his Beneficiary after the Participant's Termination of Employment;

(e) made on or after the date on which the Participant attains age 55 and his subsequent Termination of Employment;

(f) made to the Participant in an amount not in excess of the amount allowable as a deduction for federal income tax purposes for amounts paid during the taxable year for medical care (determined without regard to whether the Participant itemizes deductions for such taxable year);

(g) made to an alternate payee pursuant to a qualified domestic relations order as defined in Section 414(p) of the Code; or

(h) qualified and is rolled over or transferred to an individual retirement account or qualified pension or profit-sharing plan pursuant to Section 402 or 408 of the Code, whichever is applicable.

ARTICLE 11

JOINT AND SURVIVOR ANNUITY REQUIREMENTS

11.01 Controlling Article.

The provisions of this ARTICLE shall apply to any Participant who is credited with at least one (1) Hour of Service on or after August 23, 1984, and such other Participants as provided in Section 11.07. Any annuity contract distributed herefrom must be nontransferable. The terms of any annuity contract purchased and distributed by the Plan to a Participant or Spouse shall comply with the requirements of this Plan.

11.02 Qualified Joint and Survivor Annuity.

Unless an optional form of benefit is selected pursuant to a Qualified Election within the ninety (90) day period ending on the Annuity Starting Date, a married Participant's vested Account balances will be paid in the form of a Qualified Joint and Survivor Annuity and an unmarried Participant's vested Account balances will be paid in the form of a life annuity. The Participant may elect to have such annuity distributed upon attainment of the Earliest Retirement Age under the Plan.

11.03 Qualified Pre-Retirement Survivor Annuity.

Unless an optional form of benefit has been selected within the Election Period pursuant to a Qualified Election, if a Participant dies before the Annuity Starting Date then the Participant's vested Account balances will be applied toward the purchase of an annuity for the life of the surviving Spouse. The

surviving Spouse may elect to have such annuity distributed within a reasonable period after the Participant's death. In lieu of the purchase of an annuity for the life of the surviving Spouse, the surviving Spouse may elect to have the benefits paid by one of the methods described in Section 10.06(c).

11.04 Definitions.

(a) Election Period: The period which begins on the first day of the Plan Year in which the Participant attains age 35 and ends on the date of the Participant's death. If a Participant's Termination of Employment occurs prior to the first day of the Plan Year in which age 35 is attained, with respect to the Account balances as of the date of separation, the election period shall begin on the date of Termination.

Pre-age 35 waiver: A Participant who will not yet attain age 35 as of the end of any current Plan Year may make a special Qualified Election to waive the Qualified Pre-Retirement Survivor Annuity for the period beginning on the date of such election and ending on the first day of the Plan Year in which the Participant will attain age 35. Such election shall not be valid unless the Participant receives a written explanation of the Qualified Pre-Retirement Survivor Annuity in such terms as are comparable to the explanation required under Section 11.05(a). Qualified Pre-Retirement Survivor Annuity coverage will be automatically reinstated as of the first day of the Plan Year in which the Participant attains age 35. Any new waiver on or after such date shall be subject to the full requirements of this ARTICLE.

(b) Earliest Retirement Age: The earliest date on which, under the Plan, the Participant could elect to receive retirement benefits.

(c) Qualified Election: A waiver of a Qualified Joint and Survivor Annuity or a Qualified Pre-Retirement Survivor Annuity may be made. Any waiver of a Qualified Joint and Survivor Annuity or a Qualified Pre-Retirement Survivor Annuity shall not be effective unless: (i) the Participant's Spouse consents in writing. to the election; (ii) the election designates a specific Beneficiary, including any class of Beneficiaries or any contingent Beneficiaries, which may not be changed without spousal consent (or the Spouse expressly permits designations by the Participant without any further spousal consent); (iii) the Spouse's consent acknowledges the effect of the election; and (iv) the Spouse's consent is witnessed by a Plan representative or notary public. Additionally, a Participant's waiver of the Qualified Joint and Survivor Annuity shall not be effective unless the election designates a form of benefit payment which may not be changed without spousal consent (or the Spouse expressly permits designations by the Participant without any further spousal consent). If it is established to the satisfaction of a Plan representative that there is no Spouse or that the Spouse cannot be located, a waiver will be deemed a Qualified Election.

Any consent by a Spouse obtained under this subsection (c) (or establishment that the consent of a Spouse may not be obtained) shall be effective only with respect to such Spouse. A consent that permits designations by the Participant without any requirement of further consent by such Spouse must acknowledge that the Spouse has the right to limit

consent to a specific Beneficiary, and a specific form of benefit where applicable, and that the Spouse voluntarily elects to relinquish either or both of such rights. A revocation of a prior waiver may be made by a Participant without the consent of the Spouse at any time before the commencement of benefits. The number of revocations shall not be limited. No consent obtained under this provision shall be valid unless the Participant has received notice as provided in Section 11.05.

(d) Qualified Joint and Survivor Annuity: An immediate annuity for the life of the Participant with a survivor annuity, for the life of the Spouse which is not less than 50 percent and not more than 100 percent of the amount of the annuity which is payable during the joint lives of the Participant and the Spouse and which is the amount of benefit which can be purchased with the Participant's vested Account balances. The percentage of the survivor annuity under the Plan shall be 50% (unless a different percentage is elected by the Employer in Section 19 of the Adoption Agreement).

(e) Spouse (surviving Spouse): The Spouse or surviving Spouse of the Participant, provided that a former spouse will be treated as the Spouse or surviving Spouse and a current spouse will not be treated as the Spouse or surviving Spouse to the extent provided under a qualified domestic relations order as described in Section 414(p) of the Code.

(f) Annuity Starting Date: The first day of the first period for which an amount is paid as an annuity or any other form.

(g) Vested Account balances: The aggregate value of the Participant's vested Account balances derived from

Employer and Employee Contributions (including rollovers), whether vested before or upon death, including the proceeds of insurance contracts, if any, on the Participant's life. The provisions of this Section shall apply to a Participant who is vested in amounts attributable to Employer Contributions, Employee Contributions (or both) at the time of death or distribution.

11.05 Notice Requirements.

(a) In the case of a Qualified Joint and Survivor Annuity as described in Section 11.02, the Administrator shall no less than 30 days and no more than 90 days prior to the Annuity Starting Date provide each Participant a written explanation of:

(i) the terms and conditions of a Qualified Joint and Survivor Annuity;

(ii) the Participant's right to make and the effect of an election to waive the Qualified Joint and Survivor Annuity form of benefit;

(iii) the rights of a Participant's Spouse; and

(iv) the right to make, and the effect of a revocation of a previous election to waive the Qualified Joint and Survivor Annuity.

(b) In the case of a Qualified Pre-Retirement Survivor Annuity as described in Section 11.03, the Administrator shall provide each Participant, within the applicable period for such Participant a written explanation of the Qualified Pre-Retirement Survivor Annuity in such terms and in such manner as would be comparable to the explanation provided for meeting

the requirements of subsection (a) applicable to a Qualified Joint and Survivor Annuity.

The applicable period for a Participant is whichever of the following periods ends last: (i) the period beginning with the first day of the Plan Year in which the Participant attains age 32 and ending with the close of the Plan Year preceding the Plan Year in which the Participant attains age 35; (ii) a reasonable period ending after the individual becomes a Participant; (iii) a reasonable period ending after Section 417(a)(5) of the Code ceases to apply to the Participant; (iv) a reasonable period ending after this Section 11.05 first applies to the Participant. Notwithstanding the foregoing, notice must be provided within a reasonable period ending after Termination of Employment in the case of a Participant whose Termination of Employment occurred before attaining age 35.

For proposes of applying the preceding paragraph, a reasonable period ending after the enumerated events described in (ii), (iii) and (iv) is the end of the two-year period beginning one year prior to the date the applicable event occurs, and ending one year after that date. In the case of' a Participant's Termination of Employment before the Plan Year in which age 35 is attained, notice shall be provided within the two-year period beginning one year prior to Termination and ending one year after Termination. If such a Participant thereafter returns to employment with the Employer, the applicable period for such Participant shall be redetermined.

(c) Notwithstanding the other requirements of this Section 11.05, the respective notices prescribed by this Section need not be given to a Participant if (i) the plan "fully subsidizes" the costs of a Qualified Joint and

Survivor Annuity or Qualified Pre-Retirement Survivor Annuity, and (ii) the Plan does not allow the Participant to waive the Qualified Joint and Survivor Annuity or Qualified Pre-Retirement Survivor Annuity and does not allow a married Participant to designate a nonspouse Beneficiary. For purposes of this subsection (c), a plan fully subsidizes the costs of a benefit if no increase in cost, or decrease in benefits to the Participant may result from the Participant's failure to elect another benefit.

11.06 Safe Harbor Rules.

(a) This Section shall apply to a Participant in a profit-sharing plan, and to any distribution, made on or after the first day of the first Plan Year beginning after December 31, 1988, from or under a separate Account attributable solely to accumulated Deductible Employee Contributions, and maintained on behalf of a Participant in a money purchase pension plan, (including a target benefit plan) if the following conditions are satisfied: (i) the Participant does not or cannot elect payments in the form of a life annuity; and (ii) on the death of a Participant, the Participant's vested Account balances will be paid to the Participant's surviving Spouse, but if there. is no surviving Spouse, or if the surviving Spouse has consented in a manner conforming to a Qualified Election, then to the Participant's designated Beneficiary. The surviving Spouse may elect to have distribution of the vested Account balances commence within the 90-day period following the date of the Participant's death. The Account balances shall be adjusted for gains or losses occurring after the Participant's death in accordance with the provisions of the Plan governing the adjustment of Account balances for other types of distributions. This Section 11.06 shall not be operative

with respect to a Participant in a profit-sharing plan if the Plan is a direct or indirect transferee of a defined benefit plan, money purchase plan, a target benefit plan, stock bonus, or profit-sharing plan which is subject to the survivor annuity requirements of Sections 401(a)(11) and 417 of the Code. If this Section 11.06 is operative, then the provisions of this ARTICLE, other than Section 11.07, shall be inoperative.

(b) The Participant may waive the spousal death benefit described in this Section at any time provided that no such waiver shall be effective unless it satisfies the conditions of Section 11.04(c) (other than the notification requirement referred to therein) that would apply to the Participant's waiver of the Qualified Pre-Retirement Survivor Annuity.

(c) For purposes of this Section 11.06, vested Account balances shall mean in the case of a money purchase pension plan or a target benefit plan, the Participant's separate Account balances attributable solely to accumulated Deductible Contributions. In the case of a profit-sharing plan, vested Account balances shall have the same meaning as provided in Section 11.04(g).

11.07 Transitional Rules.

(a) Any living Participant not receiving benefits on August 23, 1984, who would otherwise not receive the benefits prescribed by the previous Sections of this ARTICLE must be given the opportunity to elect to have the prior Sections of this ARTICLE apply if such Participant is credited with at least one (1) Hour of Service under this Plan or the predecessor plan (if any) in a Plan Year beginning on or after January 1, 1976, and such Participant had at least ten (10) Years of Service at his Termination of Employment.

(b) Any living Participant not receiving benefits on August 23, 1984, who was credited with at least one (1) Hour of Service under this Plan or a predecessor plan (if any) on or after September 2, 1974, and who is not otherwise credited with any Service in a Plan Year beginning on or after January 1, 1976, must be given the opportunity to have his benefits paid in accordance with subsection (d).

(c) The respective opportunities to elect (as described in subsections (a) and (b)) must be afforded to the appropriate Participants during the period commencing on August 23, 1984, and ending on the date benefits would otherwise commence to said Participants.

(d) Any Participant who has elected pursuant to subsection (b) and any Participant who does not elect under subsection (a) or who meets the requirements of subsection (a) except that such Participant does not have at least ten (10) Years of Service at his Termination of Employment, shall have his benefits distributed in accordance with all of the following requirements if benefits would have been payable in the form of a life annuity:

(i) Automatic joint and survivor annuity.If benefits in the form of a life annuity become payable to a married Participant who:

(1) begins to receive payments under the Plan on or after his Normal Retirement Age; or

(2) dies on or after Normal Retirement Age while still working for the Employer; or

(3) begins to receive payment on or after the Qualified Early Retirement Age; or

(4) at his Termination of Employment on or after attaining his Normal Retirement Age (or the Qualified Early Retirement Age) and after satisfying the eligibility requirements for the -payment of benefits under the Plan and thereafter dies before beginning to receive such benefits; then such benefits will be received under this Plan in the form of a Qualified Joint and Survivor Annuity, unless the Participant has elected otherwise during the Election Period. The Election Period must begin at least six (6) months before the Participant attains Qualified Early Retirement Age and end not more than ninety (90) days before the commencement of benefits. Any election hereunder will be in writing and may be changed by the Participant at any time.

(ii) Election of early survivor annuity. A Participant who is employed after attaining the Qualified Early Retirement Age will be given the opportunity to elect, during the Election Period, to have a survivor annuity payable or death. If the Participant elects the survivor annuity, payments under such annuity must not be less than the payments which would have been made to the Spouse under the Qualified Joint and Survivor Annuity if the Participant had retired on the day before his death. Any election under this provision will be in writing and may be changed by the Participant at any time. The Election Period begins on the later of (1) the 90th day before the Participant attains the Qualified Early Retirement Age, or (2) the date on which participation begins, and ends on the date of the Participant's Termination of Employment.

(iii) For purposes of subsection (d):

(1) Qualified Early Retirement Age is the latest of:

(A) the earliest" date under the Plan, on which the Participant may elect to receive retirement benefits,

(B) the first day of the 120th month beginning before the Participant reaches Normal Retirement Age, or

(c) the date the Participant begins participation.

(2) Qualified Joint and Survivor Annuity is an annuity for the life of the Participant with a survivor annuity for the life of the Spouse as described in Section 11.04(d).

ARTICLE 12

LOANS

If permitted in Section la of the Adoption Agreement, the Employer, upon written application of a Participant in such manner and form as required by the Employer, may, in its sole discretion, authorize and direct the Trustee to make a loan from the Trust Fund to the Participant. All loans shall comply with the following terms and conditions:

(a) Loans shall be made available to all Participants and Beneficiaries on a reasonably equivalent basis.

(b) Loans shall not be made available to Highly Compensated Employees in an amount greater than the amount made available to other Employees.

(c) Loans must be adequately secured and bear a reasonable interest rate.

(d) No Participant loan shall exceed the amount of the Participant's vested Account balance.

(e) A Participant must obtain the consent of his or her Spouse, if any, to use of the Account balance as security for the loan. Spousal consent shall be obtained no earlier than the beginning of the 90-day period that ends on the date on which the loan is to be so secured. The consent must be in writing, must acknowledge the effect of the loan, and must be witnessed by a Plan representative or notary public. Such consent shall thereafter be binding with respect to the consenting Spouse or any subsequent Spouse with respect to that loan. A new consent shall be required if the Account balance is used for

renegotiation, extension, renewal, or other revision of the loan.. Notwithstanding the foregoing, this subsection (e) shall not apply in the case of a profit-sharing plan that meets the conditions described in Section 11.06.

(f) In the event of default, foreclosure on the note and attachment of security will not occur until a distributable event occurs in the Plan.

(g) No loans will be made to any shareholder-employee or Owner-Employee. 'For purposes of this requirement, a shareholder-employee means an employee or officer of an electing small business (Subchapter S) corporation who owns (or is considered as owning within the meaning of Section 318(a) (1) of the Code), on any day during the taxable year of such corporation, more than five-percent of the outstanding stock of the corporation.

If a valid spousal consent has been obtained in accordance with (e), then, notwithstanding any other provision of this Plan, the portion of the Participant's vested Account balance used as a security interest held by the Plan by reason of a loan outstanding to the Participant shall be taken into account for purposes of determining the amount of the Account balance payable at the time of death or distribution, but only if the reduction is used as repayment of the loan. If less than 100% of the Participant's vested Account balance (determined without regard to the preceding sentence) is payable to the surviving Spouse, then the Account balance shall be adjusted by first reducing the vested Account balance by the amount of the security used as repayment of the loan, and then determining the benefit payable to the surviving Spouse.

No loan to any Participant or Beneficiary can be made to the extent that such loan when added to the outstanding balance of all other loans to the Participant or Beneficiary would exceed the lesser of (i) $50,000 reduced by the excess (if any) of the highest outstanding balance of loans during the one year period ending on the day before the loan is made, over the outstanding balance of loans from the Plan on the date the loan is made, or (ii) one-half the present value of the nonforfeitable. accrued benefit of the Participant or, if greater, the total accrued benefit up to $10,000. For the purpose of the above limitation, all loans from all plans of the Employer and other Controlled Group Members are aggregated. Furthermore, any loan shall by its terms require that repayment (principal and interest) be amortized in level payments, not less frequently than quarterly, over a period not extending beyond five years from the date of the loan, unless such loan is used to acquire a dwelling unit which within a reasonable time (determined at the time the loan is made) will be used as the principal residence of the Participant. An assignment or pledge of any portion of the Participant's interest in the Plan and a loan, pledge, or assignment with respect to any insurance contract purchased under the Plan, will be treated as a loan under this paragraph.

ARTICLE 13

TOP-HEAVY PLANS

If the Plan is or becomes Top-Heavy in any Plan Year beginning after December 31, 1983, the provisions of this ARTICLE 13 will supersede any conflicting provisions in the Plan or Adoption Agreement.

13.01 Definitions.

(a) Key Employee: Any Employee or former Employee (and the Beneficiaries of such Employee) who at any time during the determination period was (i) an officer of the Employer if such individual's Compensation exceeds fifty (50) percent of the dollar limitation under Section 415(b)(1)(A) of the Code, (ii) an owner (or considered an owner under Section 318 of the Code) of one of the ten largest interests in the Employer if such individual's Compensation exceeds the dollar limitation under Section 415(c)(1)(A) of the Code, (iii) a Five-Percent Owner, or (iv) a one-percent owner of the Employer who has Compensation of more than $150,000. For purposes of this subsection (a), Compensation means compensation as defined in Section 415(c)(3) of the Code, but including amounts contributed by the Employer pursuant to a salary reduction agreement which are excludible from the Employee's gross income under Section 125, 402(a)(8), 402(h) or 403(b) of the Code. The determination period is the Plan Year containing the Determination Date and the four (4) preceding Plan Years. The determination of who is a Key Employee will be made in accordance with Section 416(1)(1) of the Code and the regulations thereunder.

(b) Top-Heavy Plans: For any Plan Year beginning after December 31, 1983, this Plan is Too-Heavy if any of the following conditions exists:

(i) If the Top-Heavy Ratio for this Plan exceeds sixty (60) percent and this Plan is not part of any Required Aggregation Group or Permissive Aggregation Group of plans.

(ii) If this Plan is a part of a Required Aggregation Group of plans but not part of a Permissive Aggregation Group and the Top-Heavy Ratio for the group of plans exceeds sixty (60) percent.

(iii) If this Plan is a part of a Required Aggregation Group and part of a Permissive Aggregation Group of plans and the Top-Heavy Ratio for the Permissive Aggregation Group exceeds sixty (60) percent.

(c) Too-Heavy Ratio:

(i) If the Employer maintains one or more defined contribution plans (including any simplified employee pension plan) and the Employer has not maintained any defined benefit plans which during the five (5) year period ending on the Determination Date (s) has or has had accrued benefits, the Top-Heavy Ratio for this Plan alone or for the Required or Permissive Aggregation Group as appropriate is a fraction, the numerator of which is the sum of the account balances of all Key Employees as of the Determination Date(s) (including any part of any account balance distributed in the five (5) year period ending on the Determination Date(s)), and the denominator of which is the sum of all account balances (including any part of any account balance distributed in the five (5) year period ending on the Determination Date(s)), both computed in accordance

with Section 416 of the Code and the regulations thereunder. Both the numerator and denominator of the Top-Heavy Ratio are increased to reflect any contribution not actually made as of the Determination Date, but which is required to be taken into account on that date under Section 416 of the Code and the regulations thereunder.

(ii) If the Employer maintains one or more defined contribution plans (including any simplified employee pension plan) and the Employer maintains or has maintained one or more defined benefit plans which during the five (5) year period ending on the Determination Date(s) has or has had any accrued benefits, the Top-Heavy Ratio for any Required or Permissive Aggregation Group as appropriate is a fraction, the numerator of which is the sum of the account balances under the aggregate defined contribution plan or plans for all Key Employees determined in accordance with (i), and the present value of accrued benefits under the aggregated defined benefit plan or plans for all Key Employees as of the Determination Date(s), and the denominator of which Is the sum of the account balances under the aggregated defined contribution plan or plans for all Participants, determined in accordance with (i), and the present value of accrued benefits under the defined benefit plan or plans for all Participants as of the Determination Date(s), all determined in accordance with Section 416 of the Code and the regulations thereunder. The accrued benefits under a defined benefit plan in both the numerator and denominator of the Top-Heavy Ratio are increased for any distribution of an accrued benefit made in the five (5) year period ending on the Determination Date.

(iii) For purposes of (i) and (ii), the value of account balances and the present value of accrued benefits will be determined as of the most recent Valuation Date that falls within or ends with the twelve (12) month period ending on the Determination Date, except as provided in Section 416 of the Code and the regulations thereunder for the first and second plan years of a defined benefit plan. The account balances and accrued benefits of a Participant (1) who is not a Key Employee but who was a Key Employee in a prior year, or (2) who has not been credited with at least one Hour of Service with any Employer maintaining the Plan at any time during the five (5) year period ending on the Determination_ Date will be disregarded. The calculation of the Top-Heavy Ratio and the extent to which distributions, rollovers and transfers are taken into account will be made in accordance with Section 416 of the Code and the regulations thereunder. Deductible Contributions will not be taken into account for purposes of computing the Top-Heavy Ratio. When aggregating plans, the value of account balances and accrued benefits will be calculated with reference to the Determination Dates that fall within the same calendar year.

The accrued benefit of a Participant other than a Key Employee shall be determined under (A) the method, if any, that uniformly applies for accrual purposes under all defined benefit plans maintained by the Employer, or (B) if there is no such method, as if such benefit accrued not more rapidly than the slowest accrual rate permitted under the fractional rule of Section 411(b)(1)(C) of the Code.

(d) Permissive Aggregation Group: The Required Aggregation Group of plans plus any other plan or plans of the Employer which, when considered as a group with the Required Aggregation Group, would continue

to satisfy the requirements of Sections 401(a)(4) and 410 of the Code.

(e) Required Aggregation Group: (i) Each qualified plan of the Employer in which at least one Key Employee participates, or participated at any time during the Determination Period (regardless of whether the Plan has terminated), and (ii) any other qualified plan of the Employer which enables a Plan described in (i) to meet the requirements of Section 401(a)(4) or 410 of the Code.

(f) Determination Date: For any Plan Year subsequent to the first Plan Year, the last day of the preceding Plan Year. For the first Plan Year, the last day of that Plan Year.

(g) Valuation Date: The date elected by the Employer in Section 16 of the Adoption Agreement as of which account balances or accrued benefits are valued for purposes of calculating the Top-Heavy Ratio.

(h) Present Value: Present Value shall be based only on the interest and mortality rates specified in Section 16 of the Adoption Agreement.

(i) Super Top Heavy Plan: The Plan if it would be a Top Heavy Plan under Section 13.01(b) hereof if the words "ninety (90) percent" were substituted for the words "sixty (60) percent" in Section 13.01(b) hereof.

13.02 Minimum Allocation.

(a) Except as otherwise provided in subsections (b) and (c), the Employer Contributions and Forfeitures allocated on behalf of any Participant who is not a Key Employee shall not be

less than the lesser of three percent of such Participant's Compensation or in the case where the Employer has no defined benefit plan which designates this Plan to satisfy Section 401 of the Code, the largest percentage of Employer Contributions and Forfeitures, as a percentage of the first $200,000 of the Key Employee's Compensation, allocated on behalf of any Key Employee for that Plan Year. The minimum allocation is determined without regard to any Social Security contribution. This minimum allocation shall be made even though, under other Plan provisions, the Participant would not otherwise be entitled to receive an allocation, or would have received a lesser allocation for the Plan Year because of (i) the Participant's failure to complete 1,000 Hours of Service (or any equivalent provided in the Plan), or (ii) in the case of a CODA, the Participant's failure to have Elective Deferrals made to the Plan on his behalf, or (iii) Compensation less than a stated amount.

(b) For purposes of computing the minimum allocation, Compensation shall mean compensation as defined in Section 2.13. If the Plan is a non-standardized plan, Compensation is to be computed without reference to the exclusions otherwise permitted in Section 9 of the Adoption Agreement.

(c) The provision in subsection (a) shall not apply to any Participant who was not employed by the Employer on the last day of the Plan Year.

(d) The provision in subsection (a) shall not apply to any Participant to the extent the Participant is covered under any other plan or plans of the Employer and the Employer has provided in Section 16 of the Adoption Agreement that the minimum

allocation or benefit requirement applicable, to Top-Heavy plans will be met in the other plan or plans.

(e) The minimum allocation required (to the extent required to be nonforfeitable under Section 416(b) of the Code) may not be forfeited under Section 411(a)(3)(B) or (D) of the Code. For each Plan Year in which the Paired Plans are Top-Heavy, the Employer will provide a minimum contribution equal to three (3) percent of total Compensation for each non-Key Employee who is entitled to a minimum contribution under Paired Plans #001 or #003.

13.03 Minimum Vesting Schedule.

For any Plan Year in which this Plan is Top-Heavy, one of the minimum vesting schedules as elected by the Employer in Section 16 bf the Adoption Agreement will automatically apply to the Plan. The minimum vesting schedule applies to all benefits within the meaning of Section 411(a)(7) of the Code except those attributable to Employee Contributions, including benefits accrued before the effective date of Section 416 of the Code and benefits accrued before the Plan became Top-Heavy. Further, no decrease in a Participant's nonforfeitable percentage may occur in the event the Plan's status as Top-Heavy changes for any Plan Year. However, this Section does not apply to the Account balances of any Employee who does not have an Hour of Service after the Plan has initially become Top-Heavy and such Employee's Account balance attributable to Employer Contributions and Forfeitures will be determined without regard to this Section 13.03.

13.04 Special Limitations on Top Heavy Allocations in Multiple Plans: "Code Section 415(e) Buy-Back".

If for any Plan Year the Plan is a Top Heavy Plan, and the Employer maintains or has ever maintained a qualified defined benefit pension plan, then in applying the limitations of Section 5.07 the words "100 percent" shall be substituted for the words "125 percent" in both the Defined Benefit Fraction and the Defined Contribution Fraction, as such terms are defined in Section 5.07, unless the Employer elects to "buy-back" the use of the "125 percent" limit with respect to any Plan Year in which the Plan is not Super Top Heavy by providing minimum benefits in excess of those otherwise required pursuant to the provisions of Section 13.02. An Employer accomplishes this "Code Section 415(e) Buy-Back" by electing to retain the use of the "125 percent" limit in Section 16(c)(i) of a non-standardized Adoption Agreement or Section 16(b)(i) of a standardized Adoption Agreement and by agreeing to provide the required increased minimum benefits according to one (1) of the following methods.

(a) If the Plan is a Paired Plan, then the minimum accrual provisions of Sections 14.03 shall apply automatically.

(b) If the Plan is not a Paired Plan, the Employer may nevertheless elect to provide the minimum accruals set out in Section 14.03 by electing in Section 16(c)(ii) of a non-standardized Adoption Agreement or Section 16(b)(ii) of a standardized Adoption Agreement to be subject to the Paired Plan provisions of ARTICLE 14.

(c) If the Plan is not a Paired Plan, the Employer may elect (by setting out overriding provisions in Section 16(c)(ii) of a non-standardized Adoption Agreement or Section 16(b)(ii) of a standardized Adoption

Agreement) to provide the minimum accruals required by Section 416(h)(2) of the Code by some method other than that set out in Section 14.03.

If the Plan is one (1) of multiple qualified plans maintained by the Employer and is not a Paired Plan, nor is to be considered to be a Paired Plan, and the Employer has not elected to utilize the Code Section 415(e) Buy-Back provisions, then the Employer shall provide (by setting out overriding provisions in Section 16(c)(ii) of a non-standardized Adoption Agreement or Section 16(b)(ii) of a standardized Adoption Agreement) minimum benefit accruals pursuant to Section 416(f) of the Code.

ARTICLE 14

PAIRED PLANS

14.01 Paired Plans.

The provisions of this ARTICLE shall apply if either:

(a) this Plan is a Paired Plan or,

(b) this Plan is not a Paired Plan, but is to be considered to be subject to the Paired Plan provisions of this ARTICLE under Section 16(c)(ii) of the Adoption Agreement.

Under this ARTICLE, Sections 14.03 and 14.04 shall apply with respect to Plan Years in which the Plan is considered as paired hereunder with a defined benefit pension plan maintained by the Employer, while Sections 14.05 and 14.06 shall apply with respect to Plan Years in which the Plan is paired, or considered as paired hereunder with another defined contribution plan maintained by the Employer, whether or not the Plan is also considered as paired hereunder, with a defined benefit pension plan.

With respect to such Paired Plans, the term "Compensation" shall have the meaning set forth in Section 415(c)(3) of the Code.

14.02 Multiple Benefits from Super Too Heavy Paired Plans.

In any Plan Year in which the Plan is considered to be a Paired Plan with a defined benefit pension plan, and the Plan is or becomes a Super Top Heavy Plan, as defined in Section 13.01(1), then the "Code Section

415(e) Buy-Back", as that term is defined in Section 13.04 hereof, shall not be available.

14.03 Minimum Defined Contribution Plan Allocations Under Top Heavy Paired Plans with Code Section 415(e) Buy-Back.

In any Plan Year in which the Plan is considered to be a Paired Plan (or has elected to be treated as a Paired Plan) with a qualified defined benefit pension plan, when the Plans are considered Top Heavy Plans, but are not Super Top Heavy Plans, and the Employer has elected to utilize the Code Section 415(e) Buy-Back, minimum nonintegrated allocations shall be made under this Section. Each Employee who participates in this Paired Plan and who also participates in the defined benefit pension plan considered to be a Paired Plan shall receive a minimum nonintegrated allocation of seven and one-half percent (7-1/2%) of Compensation under Section 13.02 of this Paired Plan instead of three percent (3%) of Compensation. Any Employee who is a Participant otherwise entitled to receive top heavy allocations from this Paired Plan., but who is not entitled to receive a minimum benefit from the defined benefit pension plan considered to be Paired Plan, shall receive a minimum nonintegrated allocation of four percent (4%) of Compensation under Section 13.02 of this Paired Plan instead of three percent (3%) of Compensation. Any Employee who is a Participant not entitled to receive top heavy allocations from this Paired Plan, but who is entitled to receive a minimum benefit from the defined benefit pension plan considered to be a Paired Plan, shall receive a minimum non-integrated accrued benefit of 3% of the highest five (5) consecutive year average compensation (not to exceed a cumulative accrued benefit of thirty percent (30%)).

14.04 Minimum Defined Contribution Plan Allocations Under Super Too Heavy Paired Plans or Without Code Section 415(e) Buy-Back.

In any Plan Year in which the Plan is considered to be a Paired Plan (or has elected to be treated as a Paired Plan) with a qualified defined benefit pension plan, if the Paired Plans are considered Super Top Heavy or if the Employer has elected not to utilize the Code Section 415(e) Buy-Back, then minimum nonintegrated allocations shall be made under this Section. Each Employee who is a Participant in this Paired Plan and who also participates in the defined benefit pension Paired Plan shall receive a minimum nonintegrated allocation of five percent (5%) of such Participant's Compensation. under Section 13.02 of this Paired Plan instead of three percent (3%) of Compensation. Any Employee who is a Participant otherwise entitled to receive top heavy allocations from this Paired Plan, but who does not participate in the defined benefit pension Paired Plan, shall receive a minimum nonintegrated allocation of three percent (3%) of Compensation under 13.02 of this Paired Plan.

The minimum nonintegrated allocations provided hereunder shall be made without reference to, or limitation by, any lesser Employer contribution having been allocated on behalf of any Key Employee in the Plan.

14.05 Defined Contribution Paired Plan Prevention of Duplication of Allocations.

In any Plan Year in which the Plan is a Paired Plan with a defined contribution plan, the Employer shall provide each Employee who is a Participant in this

Paired Plan and who participates in the other defined contribution Paired Plan the minimum nonintegrated allocation specified under this ARTICLE only in that Paired Plan indicated in Section 16(c)(iii) of the Adoption Agreement.

14.06 Forfeitures in Profit-Sharing Plans.

If this Plan is a profit-sharing Paired Plan, then the minimum nonintegrated allocations provided by this Plan under this ARTICLE shall include in their computation Forfeitures.

14.07 Integrated Paired Plans.

If the Paired Plans involve integration with Social Security, then only one (1) Paired Plan shall be integrated.

ARTICLE 15

PLAN ADMINISTRATION

15.01 Administrator.

The Employer shall be the Administrator of the Plan and shall have the sole power, duty and responsibility of directing the administration of the Plan in accordance with the provisions herein set forth. Except with respect to rights and powers expressly or impliedly reserved in the Sponsor to amend the Plan in order to maintain its status as a Plan qualified and approved under the Code, and to assist in its interpretation and administration, the Employer shall have the sole and absolute right and power to construe and interpret the provisions of the Plan and administer it for the best interest of its Employees including, but not limited to, the following powers and duties:

(a) to construe any ambiguity and interpret any provision of the Plan or supply any omission or reconcile any inconsistencies in such manner as it deems proper;

(b) to determine eligibility to become a Participant in the Plan in accordance with its terms;

(c) to decide all questions of eligibility for, and determine the amount, manner, and time of payment of any benefits hereunder, and to afford any person dissatisfied with such decision or determination, upon written notice thereof, the right to a full and fair hearing thereon;

(d) to establish uniform rules and procedures to be followed by Participants and Beneficiaries in filing

applications for benefits, in furnishing and verifying proofs necessary to determine age, and in any other matters required to administer the Plan;

(e) to adopt such reasonable accounting methods as it deems necessary or desirable, to receive and review the annual allocation report on the Plan and to bring up to date the balances of all Accounts;

(f) to receive and review reports of the financial condition and of the receipts and disbursements of the Trust Fund from the Trustee, and to determine and communicate to the Trustee the long-term and short-term financial goals of the Plan;

(g) to file such reports and statements, and to make such disclosures as required by law; and

(h) to furnish to Participants and Beneficiaries such information and statements, with respect to the Plan and their individual interests therein as required by law, and any additional information as deemed to be appropriate by the Employer.

All directions by the Employer shall be conclusive on all parties concerned; including the Trustee, and all decisions of the Employer as to the facts of any case and the meaning, intent, or proper construction of any provision of the Plan, or as to any rule or regulation in its application to any case shall be final and conclusive; provided, however, that all rules and decisions of the Employer shall be uniformly and consistently applied to all Employees in similar circumstances, and the Employer shall have no power to administratively add to, subtract from or modify any of the terms cf the Plan, or to change, add to or subtract from any benefits provided by the Plan, or to waive or fail to apply any

requirements of eligibility for participation or for benefits under the Plan.

15.02 Claims Procedure.

If, upon application for benefits made by a Participant or Beneficiary pursuant to Section 10.01(b), the Employer shall determine that benefits applied for shall be denied either in whole or in part, the following provisions shall govern:

(a) Notice of Denial. The Employer shall, upon its denial of a claim for benefits under the Plan, provide the applicant with written notice of such denial setting forth:

(i) the specific reason or reasons for the denial;

(ii) specific reference to pertinent Plan provisions upon which the denial is based;

(iii) a description of any additional material or information necessary for the claimant to perfect the claim, and

(iv) an explanation of the claimant's rights with respect to the claims review procedure as provided in subsection (b) of this Section.

(b) Claims Review. Every claimant with respect to whom a claim is denied shall, upon written notice of such denial, have the right to:

(i) request a review of the denial of benefits by written notice delivered to the Employer,

(ii) review pertinent documents, and

(iii) submit issues and comments in writing.

(c) Decision on Review. The Employer shall, upon receipt of a request for review submitted by the claimant in accordance with subsection (b), appoint a committee for the purpose of conducting such review, and provide the claimant with written notice of the decision reached by the said Committee setting forth the specific reasons for the decision and specific references to the provisions of the Plan upon which the decision is based. Such notice shall be delivered to the claimant not later than 60 days following the receipt of the claimant's request, or, in the event that the Employer shall determine that a hearing is needed no later than 120 days following the receipt of such request.

15.03 Records

All acts, determinations and correspondence with respect to the Plan shall be duly recorded and all such records, together with such other documents, including the Plan and all amendments thereto, if any, pertinent to the Plan or the administration thereof, shall be preserved in the custody of the Employer and shall at all reasonable times be made available to Participants and Beneficiaries for examination.

15.04 Delegation of Authority.

The administrative duties and responsibilities of the Employer as set forth in this ARTICLE may be delegated by the Employer in whatever manner it chooses, in whole or in part, to either a Plan Committee consisting of such persons as the Employer shall select or an Administrator. The Employer shall certify to the Trustee in writing as to the

membership and extent of authority of such Committee, or the identity and extent of authority of such Administrator, and any changes relative thereto as may occur from time to time. The authority of either the Committee or the Administrator shall be deemed to be that of the Employer to the extent so certified by the Employer. The Trustee shall be entitled to rely on the last such certification received and to continue to rely thereon until subsequent written certification to the contrary is received from the Employer. The Employer shall indemnify and save harmless either the members of the Committee, and each of them, or the Administrator from any liability arising from the effects and consequences of their acts, omissions and conduct in their official capacity with respect to the Plan and the administration thereof, except to the extent that such liability shall result from their own willful misconduct or gross negligence.

The Employer, or either the Plan Committee or the Administrator to which it has delegated its duties and responsibilities hereunder, may employ such competent agent or agents as it may deem appropriate or desirable to perform such ministerial duties or consultative or other services as the Employer or either its Committee or Administrator may in its discretion deem necessary to facilitate the efficient and proper administration of the Plan. The Employer and either its Committee or Administrator shall be entitled to rely upon all reports, advice and information furnished by such agent or agents, and all action taken or suffered by them in good faith in reliance thereon shall be conclusive upon all agents, Participants, Retired Participants, Beneficiaries and other persons interested in the Plan.

15.05 Correction of Errors.

If any change in records or error results in any Participant, Retired Participant or Beneficiary receiving from the Plan more or less than he would have been entitled to receive had the records been correct or had the error not been made, the Employer, upon discovery of such error, shall correct the error by adjusting, as far as is practicable, the payments in such a manner that the benefits to which such person was correctly entitled shall be paid.

15.06 Domestic Relations Orders.

(a) If the Trustee, the Employer, or the Committee receives a domestic relations order that purports to require the payment of a Participant's benefits to a person other than the Participant, the Committee shall take the following steps:

(i) If benefits are in pay status, the Committee shall direct the Trustee to account separately for the amounts that will he payable to the Alternate Payees (defined below) if the order is a Qualified Domestic Relations Order (defined below).

(ii) The Committee shall promptly notify the named Participant and any Alternate Payees of the receipt of the domestic relations order and of the Committee's procedures for determining if the order is a Qualified Domestic Relations Order.

(iii) The Committee shall determine whether the order is a Qualified Domestic Relations Order under the provisions of Section 414(p) of the Code.

(iv) The Committee shall notify the named Participant and any Alternate Payees of its determination as to whether the order meets the requirements of a qualified Domestic Relations Order.

(b) If, within 18 months beginning on the date the first payment would be made under the domestic relations order (the "18-Month Period"), the order is determined to be a Qualified Domestic Relations Order, the Committee shall direct the Trustee to pay the specified amounts to the persons entitled to receive the amounts pursuant to the order.

(c) If, within the 18-Month Period (i) the order is determined not to be a Qualified Domestic Relations order or (ii) the issue as to whether the order is a Qualified Domestic Relations Order has not been resolved, the Committee shall direct the Trustee to pay the amounts (and any interest thereon) to the Participant or other person who would have been entitled to such amounts if there had been no order.

(d) If an order is determined to be a Qualified Domestic Relations order after the end of the 18-Month Period, the determination shall be applied prospectively only.

(e) A Qualified Domestic Relation Order shall not require

(i) the Plan to provide any type or form of benefits, or any option, not otherwise provided under the Plan, or

(ii) the payment of benefits to an Alternate Payee which are required to be paid to another Alternate Payee under another order previously determined to be a Qualified Domestic Relations Order.

(f) In the case of any payment before a Participant has terminated employment, a Qualified Domestic Relations Order shall not be treated as failing to meet the requirements of subparagraph (e)(i) above solely because such order requires that payment of benefits be made to an Alternate Payee:

(i) on or after the date on which the Participant attains (or would have attained) the earliest retirement date, or

(ii) as if the Participant had retired on the date on which such payment is to begin under such order (but taking into account only the value of the Participant's Account on such date).

For this purpose, "earliest retirement date" shall mean the earlier of: (1) the date on which the Participant is entitled to a distribution under the Plan, or (2) the later of the date-the Participant attains age fifty (50), or the earliest date on which the Participant could begin receiving benefits under the Plan if he terminated employment.

(g) To the extent provided in a Qualified Domestic Relations. Order, the former spouse of a Participant shall be treated as a Surviving Spouse for purposes of Sections 401(a)(11) and 417 of the Code.

(h) For the purposes of this Section, the following terms shall have the following definitions:

Alternate Payee - Any spouse, former spouse, child or other dependent of a Participant who is recognized by a domestic relations order as having a right. to all or a portion of the benefits payable under the Plan to the Participant.

Qualified Domestic Relations Order - Any domestic relations order or judgment that meets the requirements set forth in Section 414(p) of the Code.

(i) In addition to the right to all or a portion of the benefits payable under the Plan to a Participant, an Alternate Payee shall have the same option of obtaining a loan from the Plan, pursuant to ARTICLE 12, or directing the investment of his Account, pursuant to Section 5.08, if such options are available to Participants.

ARTICLE 16

THE TRUST

16.01 The Trust.

The Employer which executed an Adoption Agreement and thus adopted the Plan, thereby established a Trust. By execution of the Adoption Agreement, the Trustee accepted the position of trustee thereof, and all the duties and responsibilities of that position. The Trust Fund shall consist of such. cash and other property as shall be paid or delivered from time to time by the Employer to the Trustee, together with the earnings and profits thereon. The Trust Fund shall be held, managed and administered by the Trustee in trust without distinction between principal and income in accordance with the provisions of this Plan, but shall be accounted for separately by the Trustee as to each Employer which adopts the Plan.

16.02 Contributions to Trustee.

Contributions shall be paid to the Trustee in accordance with the terms of the Plan. It shall be the duty of the Trustee to receive, hold, invest, reinvest and distribute the Trust Fund in accordance with the provisions of this Plan. The Trustee shall be under no duty to enforce payment of any contribution to the Trust Fund and shall not be responsible for the adequacy of the Trust Fund to meet and discharge any liabilities under the Plan.

16.03 Investment Powers.

The Trustee, upon its own discretion with respect to Trust Fund investments, shall, except as otherwise restricted by law and the provisions hereof and except

as provided in Section 16.04, be authorized and empowered:

(a) to invest and reinvest the principal and income of the Trust Fund in any and all stocks, bonds, mutual funds, notes, debentures, mortgages, equipment trust certificates, insurance company contracts and in such other property, real or personal, investments and securities of any kind, class or character, including investments and qualifying securities or realty of the Employer, whether income-producing or not, units of any commingled, common pooled or mutual trust fund described in this Section, including securities issued by the Trustee (if the option under Section 5.08 is available to a Participant), savings accounts, certificates of deposit and time deposits of the Trustee or other institutions and securities as the Trustee may at some future date be authorized to make available to the Trust customer by the Securities and Exchange Commissioner within the guidelines, policies, procedures or approvals of the Comptroller of the Currency or the Federal Deposit Insurance Corporation; and in making such investments and reinvestments, the Trustee shall not be restricted to properties and securities authorized for investment by Trustees or other fiduciaries by the applicable statutory legal list of such properties and securities;

(b) to keep such portion of the Trust Fund in cash or cash balances as deemed to be in the best interest of the Trust;

(c) to sell, exchange, convey, transfer or otherwise dispose of any property held by it, by private contract or at public auction;

(d) to vote or to refrain from voting upon any stocks, bonds or other securities; to give general or special proxies or powers of attorney with or without power of substitution; to exercise any conversion privileges, subscription rights, or other options and to make any payments incidental thereto; to consent to or otherwise participate in corporate reorganizations or other changes affecting corporate securities and to delegate discretionary powers and to pay any assessments or charges in connection therewith, and generally to exercise any of the powers of any owner with respect to stocks, bonds, securities or other property held in the Fund;

(e) to make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(f) to register any investment of the Trust Fund in its own name or in the name of a nominee or nominees and to hold any investment in bearer form, but the books and records of the Trustee shall at all times show that all such investments are part of the Trust Fund;

(g) to employ suitable agents and counsel, and to pay their reasonable expenses and compensation;

(h) to borrow money from time to time for the purposes of the Trust on such terms and conditions as may be deemed to be advisable, and for any sum so borrowed to issue its promissory note as Trustee and to secure the repayment thereof by pledging all of any part of the Fund; and

(i) to make loans to Participants pursuant to ARTICLE 12 of the Plan and Section 14 of the Adoption Agreement.

Notwithstanding the foregoing, the Trustee is specifically authorized to invest the assets of the Trust Fund in any and all funds, whether or not presently in existence, which are, or shall be, maintained by the Trustee, including, without limiting the generality of the foregoing, mutual commingled, pooled or common Trust Funds, the terms and conditions of which are, and shall be on a continuing basis, hereby incorporated by reference as if fully set forth herein. Further provided, however, that notwithstanding any provision of the Plan to the contrary, no Trust Fund assets attributable to individual retirement accounts, if any, shall be invested in life insurance contracts, and no Trust Fund assets attributable to either individual retirement accounts or individually directed account amounts, if any, shall be invested in "collectibles" (as defined by Section 408(n) of the Code).

16.04 Appointment of Investment Manager.

The Employer, if it has so elected in Section 17(a) of the Adoption Agreement, may at any time and from time to time appoint in writing an Investment Manager or Managers to manage all or any portion of the assets of the Plan, and may revoke any such appointment previously made. For purposes hereof, the Employer shall mean only the entity executing the Adoption Agreement as "Employer," but shall not mean any organization executing the Plan as an "Adopting Employer." While such an appointment is in effect, the relations among the Administrator, Employer,

Investment Manager and Trustee shall be governed by the following provisions:

(a) The Employer shall certify to the Trustee the name or names of any Investment Manager appointed by it to manage the investment or reinvestment of all or any portion of the Trust Fund. Such certificate shall also state that the Investment Manager has acknowledged his fiduciary status with respect to the Plan in writing.

(b) The Trustee shall segregate any portion of the Trust Fund held by it which will be subject to the management of an Investment Manager into one or more separate accounts to be known as investment manager accounts and shall charge any expenses related to investments directed by an Investment Manager against such accounts. Each Investment Manager shall have the right and power to manage the investment and reinvestment of his investment manager account. The Trustee shall follow the directions of the Investment Manager with respect to the account of such Investment Manager and shall not be obligated to invest or otherwise manage any such investment manager account. All directions given by an Investment Manager to the Trustee shall be in writing, signed by an officer or a partner of the Investment Manager or by such other person or persons as may be designated by such officer or partner. Subject to such conditions as may be approved by the Employer and Trustee, the Investment Manager may place direct orders for the purchase or sale of securities or other property for its investment manager account, provided, however, that, in the case of an Investment Manager as defined in Section 2.35(a), the Trustee shall nevertheless retain custody of the assets comprising said account. In the case of an Investment Manager defined in Section

2.35(b), the Investment Manager may be permitted to retain custody of the assets comprising said account.

(c) If the Employer, by written notice to the Trustee, terminates the authority of an Investment Manager but does not appoint a successor to manage the investment and reinvestment of the account of such Investment Manager, the portion of the fund then held in such investment manager account shall return to the unsegregated portion of the Trust Fund and the Trustee shall have authority to manage the investment and reinvestment of such account. Until receipt of a written notice terminating the authority of an Investment Manager, the Trustee shall be fully protected in relying upon the latest prior written notice of appointment of an Investment Manager.

(d) Any Investment Manager may, in writing, authorize the Trustee to invest any portion of his investment manager account in short-term investments. The Trustee, in its sole discretion, may make such investments either directly or by investment collectively with other assets, including but not limited-to investment in any common, commingled, mutual or pooled trust fund established and maintained by the Trustee for the investment of funds administered in a fiduciary capacity.

(e) The Trustee shall not be responsible for any loss caused by its acting upon any notice, direction or certification of any Investment Manager appointed by the Employer which the Trustee reasonably believes to be genuine. The Trustee shall have no duty to question any direction, action or inaction of any Investment Manager taken as provided in this Section 16.04. The Trustee shall have no duty to review the securities or other property held in any investment manager account

or to make any suggestions to any Investment Manager or to the Employer with respect to the investment, reinvestment, or disposition of investments in any investment manager account. The Trustee shall not be responsible for the results arising from the Trustee's compliance with the instructions of any Investment Manager.

(f) The Trustee shall not be responsible for determining the reasonableness of any compensation paid to or agreed to be paid to an Investment Manager. Any such compensation to an Investment Manager shall be paid from the Trust Fund, if the Administrator so directs.

16.05 Employer-Directed Investments.

Notwithstanding any other provision of this Plan except Section 5.'08, the Employer shall have the right to direct in writing the Trustee from time to time to invest the assets of the Fund in such securities or other investments as the Employer shall specify in its direction, which may include, but shall not be limited to, specifying the percentage of assets to be invested in and among the trust funds authorized for investment under Section 16.03 hereof. Such direction shall be made in such form and manner as shall be required by the Trustee of the individual or individuals duly authorized by the Employer.

Directed investments shall be made by the Trustee as soon as reasonably possible after actual receipt of such direction; provided, however, the Trustee shall not be liable for losses due to reasonable delay in the execution of such directions. Notwithstanding the foregoing, in no event shall a directed investment be permitted in such an investment that the Trustee, in its sole discretion, deems itself unable to administer

efficiently, properly and conveniently with respect thereto; provided, however, that the Trustee's acceptance of the administration of a directed investment shall not be unreasonably withheld. The Trustee shall be under no duty to question any such direction of an Employer with respect to investments, nor shall the Trustee be required to review any securities or other property held pursuant to written notice. The Trustee shall not have any liability whatsoever for any losses which may result from either the Employer's direction or any investment decision made pursuant to this Section, or for any loss which may result by reason of the failure of the Employer to make such directions. Nor shall the Trustee have any liability or responsibility whatsoever for any disparity between the performance or rates of investment return of Employer-directed investments and the Trust Fund in general.

16.06 Insurance Contracts.

The Trustee may either invest in life insurance contracts or may purchase from the life insurance company specified by the Employer non-transferable annuity contracts if deemed appropriate and directed by the Employer either to carry out properly or to safeguard the obligations under the Plan.

16.07 Custodial Role.

Notwithstanding any other provisions in this Plan, if the Trustee is a bank and the bank does not have trust powers under State and/or Federal banking laws and regulations, but otherwise qualifies as a Bank under Section 581 of the Code, then the Trustee will assume the role as a custodian under this Plan, and all investments shall be handled in accordance with Section

16.04 and/or Section 5.08, if selected. Furthermore, a bank or trust company having trust powers shall act as custodian where Participant or Employer-directed investments are made under Sections 16.04 and 5.08. The Trustee's responsibilities will be as provided in Sections 16.04 and 5.08.

16.08 Liability of Trustee.

The Trustee shall not be liable for its failure to carry out the terms of this Agreement, or any instruction or direction of the Employer (or its agent), or a Participant, when issued in accordance with this Plan, or for relying upon advice given by any competent counsel or other. agent employed by the Trustee or Employer, or for the making, retention or sale of any investment or reinvestment, or for any loss to or diminution of the Trust Fund, except due to its own negligence, willful misconduct, lack of good faith or conduct otherwise constituting a breach of fiduciary duty.

16.09 Court Actions.

As a prerequisite to taking any action hereunder, the Trustee shall neither be required to receive either any order to consent of any court, nor shall the Trustee be required to file any court return or to report to any court.

16.10 Prudent Man Rule.

In discharging its duties, the Trustee shall act with the skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims:

(a) by diversifying the investments of the Trust, to the extent the Trustee has the discretionary authority and responsibility for such investments, so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent. not to do so; and

(b) in accordance with the documents and instruments governing the Plan, insofar as such documents and instruments are consistent with the provisions of ERISA.

16.11 Prohibited Transactions.

Any other provisions of the Plan and Trust Agreement to the contrary notwithstanding, neither the Employer, the Trustee nor any Disqualified Person as defined in Section 4975(d) of the Code may engage, directly or indirectly, in any of the acts or transactions under Section 4975(c) of the Code and Section 406 of ERISA for which no exemption is provided by Section 4975(d) of the Code or Section 408 of ERISA.

16.12 Conflict of Interest.

The Trustee, except as expressly permitted in Section 16.03(a), shall not:

(a) deal with the assets of the Plan in its own interest or for its own account;

(b) in its individual or in any other capacity, act in any transaction involving the Plan (or on behalf of a party or representing a party) where interests are adverse to the interest of the Plan or the interest of its Participants or Beneficiaries; or

(c) receive any consideration for its own account from any party dealing with the Plan in connection with a transaction involving the assets of the Plan.

Provided, however, that nothing in this Section shall be construed to preclude the Trustee from receiving reasonable compensation for services rendered, or for reimbursement of expenses properly and actually incurred in the performance of its duties under the Plan.

16.13 Exemptions.

Nothing in this ARTICLE shall be construed to preclude a transaction which is otherwise prohibited hereunder or under the Act, provided that the Trustee, or any other interested party or parties, shall first apply to, and secure from the Secretary of Labor, an exemption with respect to such transaction.

16.14 Insurance.

The Trustee may purchase insurance to insure itself, the Trust Fund, or other fiduciary against liability or losses occurring by reason of an act or omission of any fiduciary, provided that such insurance shall permit recourse by the insurer against the fiduciary in the case of a breach of fiduciary duty.

16.15 Accounts.

The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements and other transactions hereunder, and all accounts, books and records relating thereto shall be open to inspection and audit at all reasonable times by any person designated

by the Employer. The Trust Fund may, at the Trustee's discretion, be administered on a unit accounting basis and the value of a unit on the date of adoption or amendment of the Plan shall be as determined by the Trustee.

16.16 Reports.

Annually, or more frequently if determined by either the Employer or the Trustee, or as shall be required by law, the Trustee shall cause a valuation to be made of the Trust Fund at its fair market value. Within 120 days after the end of the Plan Year _(or on such other date as may be prescribed under regulations of the Secretary of Labor) and at the time of each valuation during the Plan Year, the Trustee shall file with the Employer and certify the accuracy of a written statement setting forth, for the valuation period, all investments, receipts, disbursements, and such other information as the Trustee maintains which the Employer may require from time to time in order to fulfill its obligations under applicable law. Upon expiration of 90 days from the date of filing of the statement as provided herein, the Trustee's liability for any inaccuracies or omissions appearing upon the face of such statement shall cease, except as otherwise may be provided by law, and except with respect to any inaccuracies or omissions as to which the Employer shall file with the Trustee written objection before the expiration of such 90-day period.

To the extent consistent with applicable law, each transaction, whether an increase or a decrease to the Trust Fund, may be expressed in terms of a number of units computed on the basis of the unit value determined on the preceding valuation date. In the event that transactions are reported in this manner, the Trustee shall state, in addition to such other information

as is required by law, the number of units in the Trust Fund and the value of a unit on the date of the statement.

16.17 Payments.

The Trustee shall make payment from the Trust Fund to such persons, in such manner and in such amounts as the Employer may direct in writing from time to time. The Trustee shall be fully protected in acting upon any such written direction without inquiry or investigation, and shall have no duty or authority to determine the rights or benefits of any Participant or Beneficiary under the Plan, or to inquire into the right or power of the Employer to direct any payment from the Fund.

16.18 Direction of Committee.

The Trustee shall be fully protected in relying upon the written certification of the Employer as to the membership and extent of authority of any committee duly authorized to act on its behalf and in continuing to rely thereon until subsequent certification has been delivered to the Trustee. The Trustee shall be fully protected in relying and acting upon any written direction of such committee whose membership and authority has been certified to the Trustee, and in continuing to so act and rely until subsequent certification that said authority has been revoked or modified has been delivered to the Trustee.

16.19 Impossibility of Performance.

In case it becomes impossible for either the Employer or the Trustee to perform any act under the Plan, that act shall be performed which in the judgment of the Trustee will most nearly carry out the intent and

purpose of the Plan. All parties to this Plan or all parties in any way interested in the Plan shall be bound by any acts performed under such conditions.

16.20 Expenses.

The expenses incurred by the Employer in the installation, administration and amendment of the Plan shall be paid from the Trust Fund, unless paid directly by the Employer. Such compensation to the Trustee as may be set forth in its published fee schedule or as from time to time agreed upon in writing from time to time between the Employer and the Trustee and the expenses incurred by the Trustee in the performance of its duties, including professional fees of any person, firm or agent employed by the Trustee to carry out the investment, management or administrative functions hereunder, and all other proper charges and disbursements of the Trustee, shall be paid from the Trust Fund, unless paid directly by the Employer.

16.21 Taxes.

The Trustee shall pay out of the Trust Fund taxes of any and all kinds including, without limiting the generality of the foregoing, property taxes and income taxes levied or assessed under existing or future laws upon or with respect to the Trust, or any monies, securities or other property forming a part thereof, or the income therefrom, subject to the terms of any agreements or contracts made with respect to trust investments which make other provisions for such tax payments. The-Trustee may assume that any taxes assessed on or with respect to the Trust or its income are lawfully assessed unless the Employer shall in writing advise the Trustee that in the opinion of counsel for the Employer, such taxes are or may be

unlawfully assessed. In the event that the Employer shall so advise the Trustee, the Trustee shall, if so requested in writing by the Employer, contest the validity of such taxes in any manner deemed appropriate by the Employer or its counsel for the refund, abatement, reduction or elimination of any such taxes.

16.22 Resignation or Removal of Trustee.

The Trustee may resign at any time upon 90 days' written notice to the Employer. The Trustee may be removed by the Employer, or the Employer may increase or decrease the number of Trustees, at any time upon 90 days' written notice delivered to the Trustee. In the event of such removal or resignation, the Employer shall designate a Successor Trustee or other medium of funding under an agreement executed for such purpose. If the Employer does not so designate such Successor Trustee or medium of funding within 60 days, the Trustee may apply to a court of competent jurisdiction for the purpose of securing the designation of same. Upon the expiration of 90 days from resignation or removal of the Trustee, the Trustee's liability for any inaccuracies or omissions shall cease, except as otherwise may be provided by law, and except with respect to any inaccuracies or omissions as to which the Employer shall file with the Trustee written objection before the expiration of such 90-day period.

16.23 Transfer of Assets to a Successor Trustee or Other Medium of Funding.

In the event the Employer wishes to continue the Plan through a Successor Trustee or through another medium of funding, it may, upon 90 days' written notice and upon furnishing evidence. of the continuation of the

Plan through a Successor Trustee or medium of funding, direct the Trustee to transfer the assets of the Trust Fund to such Successor Trustee or medium of funding, in which event the Trustee shall deliver in cash or in kind the assets of the Trust Fund (less expenses), including such instruments of conveyance and further assurance as may be reasonably required for vesting in such Successor Trustee or other medium of funding all right, title and interest of the Trustee in assets of the Trust Fund attributable to the Employer. The transfer of assets under the circumstances above shall not, within itself, be deemed a termination of the Plan, or a cessation of Employer Contributions to the Plan. Upon completion of such transfer of assets, the terms and provisions of the Plan and of this Agreement shall no longer control with respect to the Employer or the Plan (or its successor) as it may be continued by the Employer.

16.24 Assets of Controlled Group Members.

A Controlled Group Member with the written approval of the other Controlled Group Members may direct the Trustee to commingle the Trust Fund assets of its Plan with those of the assets of other Controlled Group Members held by the Trustee: in a mutual, commingled, pooled or common Trust Fund; provided, however, that adequate records shall be maintained at all times so that it is possible to ascertain and separate the Trust: Fund assets of each Controlled Group Member.

ARTICLE 17

AMENDMENT OR TERMINATION

17.01 Employer's Right to Amend Plan.

(a) The Sponsor may amend any part of the Plan. For purposes of Sponsor amendments, the mass submitter shall be recognized as the agent of the Sponsor. If the Sponsor does not adopt the amendments made by the mass submitter, it will no longer be identical to or a minor modifier of the mass submitter plan.

(b) The Employer may (i) change the choice of options in the Adoption Agreement, (ii) add overriding language in the Adoption Agreement when such language is necessary to satisfy Section 415 or 416 of the Code because of the required aggregation of multiple plans, and (iii) add certain model amendments published by the Internal Revenue Service which specifically provide that their adoption will not cause the Plan to be treated as individually designed. An Employer that amends the Plan for any other reason, including a waiver of the minimum funding requirement under Section 412(d) of the Code, will no longer participate in this master or prototype Plan and will be considered to have an individually designed plan.

(c) If the Plan's vesting schedule is amended, or the Plan is amended in any way that directly or indirectly affects the computation of the Participant's nonforfeitable percentage or if the Plan is deemed amended by an automatic change to or from a Top-Heavy vesting schedule, each Participant with at least three (3) Years of Service with the Employer may elect, within a reasonable period after the adoption of the amendment or change, to have the nonforfeitable percentage

computed under the Plan without regard to such amendment or change. For Participants who do not have at least one (1) Hour of Service in any Plan Year beginning after December 31, 1988, the preceding sentence shall be applied by substituting "five (5) Years of Service" for "three (3) Years of Service" where such language appears.

The period during which the election may be made shall commence with the date the amendment is adopted or deemed to be made and shall end on the latest of:

(i) sixty (60) days after the amendment is adopted;

(ii) sixty (60) days after the amendment becomes effective; or

(iii) sixty (60) days after the Participant is issued written notice of the amendment by the Employer or Administrator.

(d) No amendment to the Plan shall be effective to the extent that it has the effect of decreasing a Participant's accrued benefit. Notwithstanding the preceding sentence, a Participant's Account balance may be reduced to the extent permitted under Section 412(c)(8) of the Code. For purposes of this subsection, a Plan amendment which has the effect of decreasing a Participant's Account balance or eliminating an optional form of benefit, with respect to benefits attributable to Service before the amendment shall be treated as reducing an accrued benefit. Furthermore, if the vesting schedule of a Plan is amended, in the case of an Employee who is a Participant as of the later of the date such amendment is adopted or the date it becomes effective, the nonforfeitable percentage (determined as of such

date) of such Employee's Employer-derived Accrued Benefit will not be less than the percentage computed under the Plan without regard to such amendment.

17.02 Sponsor's Right to Amend Plan.

The Employer, by its act of adopting the Plan, expressly delegates to the Sponsor the power and authority to amend this Master Plan, in whole or in part, at such time or times and in such manner as the Sponsor shall deem necessary or desirable. The Sponsor shall promptly notify in writing the Employer of any such amendment, and upon receipt of such notification the Employer shall be bound thereby.

17.03 Limitation of Right to Amend.

No amendment shall have the effect of causing or permitting any part of the Trust Fund to be used for or diverted to, purposes other than for the exclusive benefit of Participants, Retired Participants and Beneficiaries, and no amendment shall have the effect of revesting in the Employer any portion of the Trust Fund.

17.04 Termination of Plan by Employer.

(a) Right Reserved. Although the Employer expects the Plan to be continued indefinitely, it reserves the right to terminate the Plan at any time by action by the Board and to discontinue all contributions hereunder in the case of a profit-sharing plan. If the Plan is a profit-sharing plan, the Employer reserves the right to temporarily suspend contributions from time to time as it shall deem appropriate and necessary, and such suspension of contributions shall not be considered to be a termination of the Plan. In the event of

termination or partial termination of the Plan, or a complete discontinuance of contributions to the Plan, the Employer shall notify the Trustee in writing of such termination and, prior to any distribution of assets hereunder, shall file notice, in such form and manner as is required by law, with the Internal Revenue Service.

(b) Distribution upon Termination. In the event of the termination or partial termination of the Plan, the Account balances of each affected Participant shall be nonforfeitable. In the event of a complete discontinuance of contributions under a profit-sharing plan, the Account balances of each affected Participant will be nonforfeitable. The Employer, by written notice of termination of the Plan, shall direct the Trustee to reduce such assets of the Trust Fund to cash which are not designated by the Employer, or, in the case of a Participant Directed Investment Account, as provided in Section 5.08, by the Participant, to be retained for distribution in kind. The Trustee shall cause a valuation of the Trust Fund to be made as of the date such assets are reduced to cash, at which time the balances of Accounts shall be brought up to date in accordance with Section 5.05. Upon completion of such accounting and receipt from the Employer of directions as to the form of distributions, the Trustee shall distribute the assets of the Trust Fund to the Participants or Beneficiaries, as the case may be, in accordance with such directions. Each Participant or Beneficiary who is entitled to receive a distribution may elect an option in accordance with Section 10.06(c) or (d), whichever applies. The manner in which the funds are applied in the case of a termination shall be subject to the requirements of ARTICLE 11.

17.05 Sponsor's Withdrawal of Participation in Master Plan.

The Sponsor may withdraw its participation as a Sponsor of this Plan as a Master Plan. The Sponsor shall notify each Employer who has adopted the Plan that the Sponsor has withdrawn its participation. Such an Employer will be deemed to have an individually-designed plan at that point.

17.06 Failure of qualification.

If the Employer's Plan fails to attain or retain qualification, such Plan will no longer participate in this Master/Prototype Plan and will be considered an individually designed Plan. If the Employer's Plan fails to attain or retain qualification, the funds of such plan will be removed from this Master Trust as soon as administratively feasible.

17.07 Mergers.

In the event of any merger or consolidation with, or transfer of assets to any other plan, each Participant will receive a benefit immediately after such merger, consolidation or transfer (if the Plan then terminated) which is at least equal to the benefit the Participant was entitled to immediately before such merger, consolidation. or transfer (if the Plan had then terminated).

ARTICLE 18

MISCELLANEOUS

18.01 Liability of Employer.

No Employee, Participant, Retired Participant or Beneficiary shall have any right or claim to any benefit under the Plan except in accordance with its provisions. The adoption of the Plan shall neither be construed as creating any contract of employment between the Employer and any Employee or otherwise conferring upon any Employee or other person any legal right to continuation of employment, nor as limiting or qualifying the right of the Employer to discharge any Employee without regard to the effect that such discharge might have upon his rights under the Plan.

18.02 Spendthrift Clause.

Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefore, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in Section 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

18.03 Successor Business of Employer.

Unless this Plan is sooner terminated, any incorporated successor to the business of the Employer may continue the Plan and such successor shall thereupon succeed to all the rights, powers and duties of the Employer hereunder. The employment of any Employee who has continued in the employ of such successor shall not be deemed to have been terminated or severed for any purpose hereunder.

In the event that the Employer is reorganized or dissolved for any reason without any provision being made for the continuance of this Plan by a successor to the business of the Employer, the Plan shall terminate and the assets shall be. distributed as provided in Section 17.04(b) hereof.

18.04 Qualification by the Internal Revenue Service.

This Plan is adopted by the Employer with the intent that it shall qualify, as provided in Sections 401(a) and 501(a) of the Code. Therefore, notwithstanding any provision of the Plan to the contrary, the Employer reserves the right, in the event of the failure of the Plan to qualify initially, as evidenced by receipt of a letter from the Internal Revenue Service that the Plan does not qualify, at its option to do either of the following:

(a) to withdraw and terminate the Plan and Trust hereunder, in which event no Participant or Beneficiary shall, except with respect to a refund of his Employee Account, have any right or claim hereunder or to any benefit from the Plan without regard to the provisions of ARTICLE 17 hereof, whereupon all contributions shall be returned to the

Employer, and the Trustee shall be discharged from all obligations hereunder; or

(b) to amend the Plan in whole or in part, retroactively or otherwise, as is necessary or advisable so that the Plan shall qualify and continue to qualify.

18.05 Use Limited to Qualified Trusts.

This Master Plan shall be made available by the Sponsor only to Plans established hereunder which shall meet, and continue to meet, the requirements of Sections 401(a) and 501(a) of the Code. Should this Master Plan be disqualified as to any adopting Employer, the funds held in Trust on behalf of said adopting Employer shall be segregated and appropriate disposition made thereof within a reasonable time after notice of such adverse determination of disqualification by the Internal Revenue Service.

18.06 Conflict of Provisions.

If any provision or term of this Plan, or of the Trust Agreement entered into pursuant hereto, is deemed to be at variance with, or contrary to, any law of the United States or applicable state law, said provision shall be severable to the extent it does not disqualify the Plan under Sections 401(a) and 501(a) of the Code and the provision of the law shall be deemed to govern.

18.07 Definition of Words.

Feminine or neuter pronouns shall be substituted for those of the masculine form, and the plural shall be

substituted for the singular, in any place or places herein where the context may require such substitution or substitutions.

18.08 Titles.

The titles of ARTICLES and Sections are included only for convenience and shall not be construed as a part of the Plan or in any respect to affect or modify its provisions.

EXHIBIT B

Department of the Treasury
Washington. DC 20224
Person to Contacts: Ms. Arrington
Telephone Number: (202) 566-4576
Refer Reply to: E:EP:Q:ICU
Date: 05/10/90

GENERAL TRUST CO
104 WOODMONT SUITE 190
NASHVILLE, TO 37205

Dear applicant:

In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

You must furnish a copy of this letter to each employer who adopts this plan. You are also required to send a copy of the approved form of the plan, any approved amendments and related documents to each key District Director of Internal Revenue Service in whose jurisdiction there are adopting employers.

Our opinion on the acceptability of the form of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a). An employer who adopts this plan will be considered to have a plan qualified under Code

section 401(a) provided all the terms of the plan are followed, and the eligibility requirements and contribution or benefit provisions are not more favorable for officers owners or highly compensated employees than for other employees. Except as stated below, the Key District Director will not issue a determination letter with regard to this plan.

Our opinion does not apply to the form of the plan for purposes of Code section 401(a)(16) if: (1) an employer ever maintained another qualified plan for one or more employees who are covered by this plan, other than a specified carried plan within the meaning of section 7 of Rev. Proc. 39-9, 1989-6 I.R.S. 14: or (2) after December 31, 1985, the employer maintains a welfare benefit fund defined in Code section 419(e), which provides postretirement medical benefits allocated to separate accounts for key employees as defined in Code section 419A(d)(3). In such situations the employer should request a determination as to whether the plan considered with all related qualified plans and, if appropriate welfare benefit funds, satisfies the requirements of Code section 40l(a)(16) as to limitations on benefits and contributions in Code section 415.

If you, the plan sponsor, have any questions concerning the IRS processing of this case please call the above telephone number. This number is only for use of the plan sponsor. Individual participants and/or adopting employers with questions concerning the plan should contact the plan sponsor. The plan's adoption agreement must include the sponsor's address and telephone number for inquiries by adopting employers.

If you write to the IRS regarding this plan, please provide your telephone number and the most convenient time for us to call in case we need more information. Whether you call or write, please refer to the Letter Serial Number and File Folder Number shown in the heading of this Letter.

You should keep this letter as a permanent record. Please notify us if you modify or discontinue sponsorship of this plan.

Sincerely yours,
Chief, Employee Plans Qualifications Branch

EXHIBIT C

PROMISSORY NOTE

State of Tennessee

County of Hamblen

Raymond B. Yates	$20,000.00
Participant	Amount of Note
P.O. Box 1067	
Morristown, TN 37816	12-13-89
Address	Date of Note

FOR VALUE RECEIVED, the undersigned (the Maker) promises to pay to the order of the Trustees of the Raymond B. Yates MD Work Purchase Pension Plan, the sum of 20,000.00 twenty thousand DOLLARS ($20,000.00), plus interest at the rate of 11%, said principle and interest thereon to be paid in the following manner:

Any holder hereof may declare all amounts due hereunder to immediately due and payable whenever the holder deems itself insecure or upon the default in any payment hereunder, or upon the Maker's failure to comply with the terms hereof, or upon the Maker's insolvency, bankruptcy, death or incompetency. After maturity, this, note will bear interest at the highest legal rate. The Maker (1) promises to pay all cost of collection, trial, appeal or otherwise; and (2) waives presentment, demand, notice or hishonor and protest.

This loan is secured by the Maker's Irrevocable Pledge and Assignment of the Maker's vested

interest in the, a copy of which is provided with this note. The security interest created by the security agreement, if any, extends to all other and future obligations of the Maker.

If the interest rate shown on the fact of this note shall exceed the rate permitted by law, the rate will be reduced by the amount necessary to comply with the law. Any sum previously collected in excess of the legal limit will be used to reduce the principal amount due or refunded to the borrower.

Each borrower shall be jointly and severally liable and each borrower, co-borrower and guarantor of this note consents to renewals, replacements and extension of time for payment hereof before, at or after maturity, consents to the acceptance of security or substituted security for this note and waives demand and protest and the right to assert any statute of limitations.

Dated this 13th day of December, 1989.

Raymond B. Yates
MAKER

WITNESS

IRREVOCABLE PLEDGE AND ASSIGNEMENT

In consideration of a loan to me of $ 20,000.00, by the Trustees of the Raymond B. Yates MD PC Work Purchase Pension Plan (the Plan), as evidenced by a copy of the Promissory Note attached to this pledge, I hereby irrevocably pledge and assign to the Trustees of the Plan, or their successor or successors, the Vested Employer Account Balance, at any time existing under the Plan, necessary to satisfy the loan which is the subject of his pledge, any unpaid interest on such loan, all attorneys' fees necessary for collection of this obligation and all costs of collection. Failure by me to repay this loan when due or to pay any installment or interest when due shall authorize the Trustees to foreclose on any property or to bring a lawsuit to collect the outstanding indebtedness and interest on the indebtedness.

Should my employment terminate with Raymond B. Yates MD PC for any reason while this obligation is unpaid and under circumstances in which the Trustees would ordinarily make a distribution from the Plan to me. The amount otherwise distributable to me or to my named beneficiary, will be reduced by this outstanding indebtedness, together with any accrued interest due on the indebtedness.

This Irrevocable Pledge and Assignment shall bind my heirs, personal representatives or other legal representatives.

Dated this 13th day of December

Raymond B. Yates
Participant

N/A
Spouse of Participant

Raymond B. Yates
Administrator
OR
Notary Public

PARTICIPANT LOAN APPLICATION

I, Raymond B. Yates hereby request a loan from the Raymond B. Yates Work Purchase Retirement Plan in the amount of $20,000.00. Please set up the loan for a repayment period of 5 years.

I understand that the maximum amount that I may borrow from the retirement plan is equal to one-half my vested account balance. I also understand that should my employment terminate for may reason while there is an unpaid balance on the loan and the trustees make a distribution from the plan to me or my beneficiary, that the trustees will reduce the amount of my distribution by the outstanding balance of the loan plus any accrued interest due on the loan. I further understand the adverse tax consequences of such a distribution: although I will receive in cash the reduced amount, the full amount vested of my account balance will be reported to the IRS as a taxable distribution.

Raymond B. Yates

RAYMOND B. YATES, M.D., P.C.
PROFIT SHARING PLAN
EMPLOYEE STATUS REPORT
PERIOD 07/01/89 TO 06/30/90

265a

	# Participants	Compensation A
Active	2	152,496.42
Total	2	152,496.42

Name	***** Vesting			***** Term. Vesting		
	100%	Partial	Zero	100%	Partial	Zero
Employer	2	0	0	0	0	0

RAYMOND B. YATES, M.D., P.C.
PROFIT SHARING PLAN
EMPLOYEE STATUS REPORT
PERIOD 07/01/89 TO 06/30/90

264a

Part.	Comp	S	AA	RA	Birth Date	Empl Date	Norm Retr Dt	Plan Entry Dt	Stat	Vest Pos	Vest Yrs	Sev Yrs	Pt. Yrs
†	*	F	42	65	12/9/47	9/1/81	7/1/12	1/1/83	Act.	09	09	09	07
††	**	M	49	65	1/18/41	9/1/81	7/1/06	1/1/83	Act.	09	09	09	07

† Marilyn Bacon 412-80-0545 * $6,940.13
†† Raymond B. Yates M.D. 435-54-3504 ** $145,556.29

267a

Part.	Comp	S	AA	RA	Birth Date	Empl Date	Norm Retr Dt	Plan Entry Dt	Stat	Vest Pos	Vest Yrs	Sev Yrs	Pt. Yrs
†	*	F	24	65	10/3/67	5/11/92	11/1/32	7/1/93	Inel.	00	00	00	00
††	**	F	0	65	0/0/0	0/0/0	0/0/0	0/0/0	Inel.	00	00	00	00
†††	***	F	0	65	0/0/0	0/0/0	0/0/0	0/0/0	Inel.	00	00	00	00
††††	****	M	49	65	1/18/41	9/1/81	7/1/06	1/1/83	Act.	09	09	09	07

† Lisa Gentry 413-49-3928
†† Lorraine Yates 437-39-5273
††† Monica Yates 000-00-0000
†††† Raymond Yates M.D. 435-54-3504

* $1,987.50
** $1,750.00
*** $650.00
**** $135,365.00

266a

4/4/1991
PLAN # 10098

RAYMOND B. YATES, M.D., P.C.
PROFIT SHARING PLAN
EMPLOYEE STATUS REPORT
PERIOD 07/01/89 TO 06/30/90

PAGE 1
SEQUENCE # 0000

Part.	Comp	S	AA	RA	Birth Date	Empl Date	Norm Retr Dt	Plan Entry Dt	Stat	Vest Pos	Vest Yrs	Sev Yrs	Pt. Yrs
†	*	F	21	65	6/25/71	12/31/91	7/1/36	1/1/93	Tem Non Part	00	00	00	00
††	**	F	42	65	12/9/47	9/1/81	7/1/12	1/1/83	Act.	11	11	11	09

† Kristin Arrlington 415-49-4441
†† Marilyn Bacon 412-80-0545

* $2,561.91
** $8,609.40

Case No. 96-34511

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION,
AT KNOXVILLE

Adversary Pro. No. 98-3088
Chapter 7

IN RE
RAYMOND B. YATES,
Debtor;

WILLIAM T. HENDON, TRUSTEE
Plaintiff,

VS.

RAYMOND B. YATES, M.D.,
P.C. PROFIT SHARING PLAN
and RAYMOND B. YATES, PLAN TRUSTEE,
Defendants.

STIPULATION OF FACTS

The parties, by and through each of their counsel, hereby submit this Stipulation of Facts regarding; the Motions for Summary Judgment filed by the Plaintiff and the Defendants in this matter. The parties stipulate to the following facts:

1. On December 13, 1989, a loan in the amount of $20,000 was taken from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan ("Money Purchase Plan") by Raymond Yates as a participant of such Money Purchase Plan. The terms of such loan

provided for a five (5) year repayment period with monthly payments of $433.85. The annual interest rate was 11%. The loan was transferred to the Raymond B. Yates, M.D., P.C. Profit Sharing Plan ("Profit Sharing Plan") on June 12, 1992. The loan was renewed for a five (5) year period at the time of transfer. This was the only outstanding loan of Dr. Yates owed to the Profit Sharing Plan as of November 1996.

2. The $50,467.46 payment to the Profit Sharing Plan in November 1996 was a repayment of the $20,000 loan that was originally taken from the Money Purchase Plan in December 1989 and renewed in 1992 when the Money Purchase Plan was merged into the Profit Sharing Plan. The $50,467.46 payment in November 1996 represented the principal plus interest due on the outstanding loan to the Profit Sharing Plan.

3. Attached to the Affidavit of Raymond B. Yates filed in support of his Motion for Summary Judgment as Exhibit C, are the trust financial records of the Money Purchase Plan and Profit Sharing Plan for the relevant times.

4. As of June 30, 1996, there were four participants in the Profit Sharing Plan. There has always been more than one participant in the Plan since its creation.

4. Dr. Raymond B. Yates' account balance in the Profit Sharing Plan as of June 30, 1996 was $366,852.25. The plan year for the Profit Sharing Plan is July 1 through June 30. Therefore, this is the year-end balance of Dr. Yates' Profit Sharing Plan account closest to the payoff date of the loan in November 1996.

Respectfully submitted this 28th day of June 1999.

KENNERLY, MONTGOMERY & FINLEY, P.C.
By: James A. Holifield, Jr., BPR#015494
Attorney for Defendant Raymond B. Yates,
M.D., P.C. Profit Sharing Plan and
Raymond B. Yates, Trustee
4th Floor, NationsBank Bldg.
550 Main Street
Knoxville, TN 37902
(423) 546-7311

MCCORD, TROUTMAN & IRWIN, P.C.
By: C. Mark Troutman, Esq.
Attorney for Plaintiff
Suite 1300, First Tennessee Plaza
Knoxville, Tennessee 37901

FILED
JUN 28, 1999
UNITED STATES BANKRUPTCY COURT EASTERN
DISRICT OF TENNESSEE

EXHIBIT F

ERISA Opinion Letter 79-08A, 01/30/1979

Reference(s): ERISA §403, ERISA §403(c), ERISA §403(c)(1), ERISA §3, ERISA §3 (7), ERISA §3(6)

Mr. Robert W. Gilbert
Suite 305
400 South Beverly Drive
Beverly Hills, California 90212
Mr. Joseph M. McLaughlin
McLaughlin and Irvin
Suite 300
800 West Sixth Street
Los Angeles, California 90017

Gentlemen:

This is in reply to your letter of November 9, 1978, requesting an advisory opinion concerning the eligibility of Mrs. Joan Adams for participation in the Southern California Retail Clerk Unions and Food Employers Council Joint Pension Trust Fund (the Fund). Specifically, you ask whether Mrs. Adams must be automatically precluded from participating in the Fund by section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Fund is a multiemployer fund jointly managed by employer and employee representatives and is subject to title I of ERISA. You also represent that Mrs. Adams, who participated in the Fund from September, 1971, until May, 1977, is the wife of the owner of a 12 1/2 percent partnership interest in Vicente Foods, where Mrs. Adams is employed and which contributes to the Fund on her behalf. You assert

that Mr. Adams owns his partnership interest as separate property, not as community property.

The Department of Labor is of the opinion that Mrs. Adams is not precluded from participating in the Fund by section 403(c)(1). Section 403(c)(1) of ERISA provides generally that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants m the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The term "participant," as it is used in ERISA section 403(c)(1), is defined in ERISA section 3(7) to include "any employee ... of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer ... or whose beneficiaries may be eligible to receive any such benefit." ERISA section 3(6) defines the term "employee" as "any individual employed by an employer." Regulation section 2510.3-3, which interprets section 3(3) of ERISA for purposes of title I thereof, provides, in part, that "[f]or purposes of this [regulation,] ... a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." However, that regulation is not intended to construe "employee" as that term is used in section 3 (6 of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for

purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

This letter is not intended to interpret or express any opinion concerning the Labor Management Relations Act to which you referred in your inquiry or concerning any other statute (other than ERISA title I and regulations pursuant thereto).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Lan D. Lanoff
Administrator of Pension and Welfare Benefit Programs
cc: Mr. Joseph M. McLaughlin

EXHIBIT G

ERISA Opinion Letter 99-04A, 02/04/1999
"Working Owners" can be participants in ERISA Pension Plan.
Reference(s): ERISA section 3(7)
John P. Counts, Esq.
David Potts-Dupre, Esq.
Counts & Kanne
Suite 444
1125 15th Street, NW Washington, D.C. 20005

Dear Messrs. Counts and Potts-Dupre:

This is in response to your request for an advisory opinion concerning the definition of "participant" provided in section 3(7) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether individuals who own business enterprises, either wholly or in part, and who provide personal services to those businesses may be "participants," within the meaning of section 3(7) of ERISA, in a multi-employer employee benefit plan. You state that the business enterprises that are the subject of this request include businesses that are operated as corporations, sole proprietorships, and partnerships.

You submit your request on behalf of the National Electrical Benefit Fund (the NEBF), a multi-employer pension plan established jointly by the International Brotherhood of Electrical Workers (IBEW) and the National Electrical Contractors Association (NECA) pursuant to collective bargaining. You describe the NEBF as the largest construction industry fund in the United States, with approximately 375,000 participants, over 14,000 contributing employers, and plan assets of almost five billion dollars.

The documents that you have submitted indicate that an individual can become eligible to participate in the NEBF only as a result of an employer's having executed a participation agreement with the NEBF, obligating the employer to make contributions on behalf of at least some of its employees. See Restated Employees Benefit Agreement and Trust for the National Electrical Benefit Fund (hereinafter Trust Agreement), Part I, Provision 4; sections 1.7, 1.8, 1.18, 6.3.3. An employer must agree at a minimum to make contributions on behalf of its bargaining unit employees. Id. section 6.3.1. Such an employer may elect, in addition, to contribute on behalf of its "non-bargaining unit employees." An employer may contribute on behalf of all "non-bargaining unit employees" or only those non-bargaining unit employees who were formerly bargaining unit members ("alumni"). Id.

With respect to bargaining unit employees, a participating employer must contribute to the NEBF an amount equal to three percent of "all wages and other compensation paid to, or accrued by, the Covered Employees in the ... bargaining unit for services performed for the Covered Employer." Id. section 6.2.1. For non-bargaining unit employees, the employer must contribute to the NEBF an amount equal to the lesser of

"(a) 3% of all wages and other compensation which the Covered Employer would pay, or which the [non-bargaining unit] Covered Employees would accrue, if the Covered Employees were receiving the wage rate received by the highest number of employees in the appropriate ... bargaining unit and working the normal straight time hours provided for in the appropriate labor agreement, or (b) 3% of all wages and other compensation paid to, or accrued by, the [non-

bargaining unit] Covered Employees for services performed for the Covered Employer ...."

Id. Section 6.2.2.

The documents that you have supplied indicate that the NEBF provides a pension benefit, which may be paid as an early retirement pension or a normal retirement pension, and a disability benefit. A participant becomes vested in his or her pension benefit upon earning at least five vesting service credits. [1] Pension benefits for vested participants are calculated by multiplying the participant's benefit service credits [2] by fixed dollar amounts that are specified in the plan. As a result, the amount of a participant's monthly pension benefit is not dependent upon the participant's actual income prior to retirement or the actual amount of contributions that an employer made on his or her behalf, but rather upon seniority in the NEBF.

You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners"' [3] to be treated as employees eligible to participate in the NEBF and therefore to become participants in the NEBF. [4] The eligible "working owners" include any "owner that earns wages or self-employment income from a company," including sole proprietors of unincorporated businesses. You indicate that the working owners who currently participate in the NEBF are journeyman electricians who had worked initially as bargaining unit members for other employers that contributed to the NEBF on their behalf. They subsequently acquired ownership interests in those employers or started their own electrical businesses, sometimes in partnership with other similarly situated individuals, sometimes by creating wholly-owned corporations, and sometimes operating as sole

proprietors. They continue to work as electricians and in some cases employ other union members covered by the NEBF. Most of these working owners had earned vested pension benefits in the NEBF based on their previous service as bargaining unit employees, and they began accruing additional service credits when the NEBF changed its eligibility rules in 1994 to permit working owners to participate.

You represent that the employer's payroll reports, submitted monthly to the NEBF, are used to determine an employer's contributions, based on the working owner's reported "wages," and a working owner's service credits, based on the working owner's reported hours of service. You further represent that reporting employers determine a working owner's "wages" by determining the greater of the working owner's actual gross earnings subject to employment tax for that month or the amount the working owner would have earned if he had worked at normal straight-time hours for the month at the applicable journeyman's rate. The working owner's hours of service are reported as the actual hours the working owner worked for the business during the month.

Section 3(7) of Title I of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(6) in turn defines an "employee" as "any individual employed by an employer." Finally; section 3(5) defines "employer" as "any person acting directly as an employer, o indirectly in the interest of an

employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." Title I of ERISA contains multiple indications, albeit indirect, that Congress assumed that a "working owner" could be a "participant" in an employee benefit plan sponsored by the business in which that working owner held an ownership right, regardless of the legal form in which the business was operated. For example, section 401(a)(2) exempts certain partnership agreements from the fiduciary provisions of Part 4. This exemption would be meaningless if the partnership agreements themselves (which cover only partners, one of the categories of "working owners") were not otherwise plans covered by

Title I. Further section 403(b)(3)(A) specifically exempts from the trust requirement of section 403(a) a plan "some or all of the participants of which are employees described in section 401(() (1) of the Code [emphasis added]." This exemption takes as its basis the assumption that the employees described in Code section 401(()(1), namely self-employed individuals (including "working owners"), are legitimate "participants" within the meaning of Title I Also, section 408(b)(1) exempts from section 406's prohibition of specified transactions certain non-discriminatory loans made to plan participants, including highly compensate(employees, but section 408(d)(1) eliminates that exemption for owner-employees as defined in section 401(()(3) of the Code. Inasmuch as the owner-employers described in Code section 401(()(3) are sole proprietors and more than ten-percent partners, it is clear that the provisions in section 408 of Title I assume that such "working owners" are "participants" in the plans from which those loans would be made.

These indications of Congressional intent are supported and reinforced by the treatment of "working owners" under the provisions of Title II and Title IV of ERISA. [5] Section 401 (c) of the Internal Revenue Code (the Code) provides that self-employed individuals are included as "employees" under Code section 401 (a) to the extent that they have earned income "with respect to a trade or business in which personal services of the [individual] are a material income producing factor." Code section 401(c)(2)(A). Code section 401(c) further imposes specific additional requirements on tax-qualified pension plans that provide benefits to "owner-employees," a term defined in Code section 401(c) (3) to include employees who own the entire interest in an unincorporated trade or business or more than 10 percent of a partnership. It is thus patently clear that Title II of ERISA permits "working owners" to receive the tax benefits that flow from participation as "participants" in pension plans that meet the qualification requirements of Code section 401(a).

Title IV of ERISA (the termination insurance provisions) also expressly includes "working owners" among the "participants" who receive its protections. See ERISA section 4001(b)(1) ("[a]n individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of [Code] section 401 (c)(1) . . ."). Section 4021(b)(9) of ERISA excludes from coverage under Title IV only those pension plans that are "established and maintained exclusively for substantial owners," i.e., sole proprietors and more than ten-percent owners of partnerships and corporations. See ERISA section 4022(b)(5)(A) (defining "substantial owner"). Title IV limits the amount of benefits that the PBGC guarantees to "substantial owners" who

participate in single employer plans, but nonetheless provides a basic guarantee of such owners' pension benefits. Such a guarantee would be meaningless if Title I did not permit such owners to be participants in ERISA- covered pension plans.

In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992). [6]

Therefore, it is the view of the Department that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan, including the NEBF, from extending plan coverage to "working owners," as described in your submission, where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provisions of Title I. [7]

ERISA's fiduciary standards, however, require compliance with any other applicable federal law. Pursuant to ERISA section 5140, nothing in Title I of

ERISA shall be construed to alter, amend, modify, invalidate, impair, or supersede any federal law or any rule or regulation issued pursuant to such federal law. Such federal laws include any requirements applicable to multi-employer benefit plans under the Labor Management Relations Act (LMRA). Several federal courts interpreting the LMRA have upheld decisions by plan trustees to exclude owner-employees on the ground that their inclusion would violate the LMRA. See, e.g., Todd v. Benal Concrete Const. Co., Inc., 710 F.2d 581 (9th Cir. 1983); Aitken v. GCU-Employer Retirement Fund, 604 F.2d 1261 (9th Cir. 1979). The Department is not authorized to issue opinions regarding the LMRA. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" should seek legal advice regarding the propriety of the participation of "working owners" in such plan under the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,
Susan G. Lahne
Acting Chief
Division of Fiduciary Interpretations
Office of Regulations and Interpretations

FOOTNOTES

1. One vesting service credit is earned for each year after 1965 in which a participant is credited with 1000 hours of covered service for covered employment

(employment during a period for which an employer is obligated to make contributions for that employee).

2. One benefit service credit is similarly earned for each year after 1965 in which a participant is credited with 1000 hours of covered employment.

3. By the term "working owner," you apparently mean any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

4. This current practice has been followed only since January, 1994. In the course of its history (since its creation in the early 1960's), the NEBF's practices have varied regarding participation by individuals who have equity ownership rights in business enterprises that operate in the industry covered by the IBEW.

5. Although we rely on certain provisions of Title II and Title IV in reaching the conclusions expressed in this opinion, nothing in this opinion should be construed as interpreting the provisions of those Titles that lie within the interpretive jurisdiction of the Department of the Treasury and the Pension Benefit Guaranty Corporation.

6. In Darden, the United States Supreme Court held that the definition of "employee" provided in section 3(6) of Title I did not include an individual who was an independent contractor to the employer that established and maintained the plan. In reaching this conclusion, the Court first sought to determine whether ERISA contained any provision "either giving specific guidance

on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." Id. at 323. Finding no guidance in the statute itself, the Court concluded that, "[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 503 U.S. at 322. We follow here the Court's analysis in Darden, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat "working owners" as "participants."

7. In its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "[a]n individual and his or her spouse ... with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3 (3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation.

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 00-6023
Filed: 8/7/00
Nsuit: 0
Yates v. Hendon
Appeal from: Eastern District of Tennessee at Knoxville

Case type information:
1) bankruptcy
2) District Court
3)

Lower court information:

District: 0649-3 : 99-00600
Court Reporter: Elizabeth Coffey
Trial Judge: Richard Stair, US Bankruptcy Judge
Trial Judge: Curtis L. Collier, U.S. District Judge
Date Filed: 11/24/99
Date order/judgment: 6/27/00
Date NOA filed: 7/25/00

Fee status: paid

Prior cases:
None
Current cases:
None

00-6023 Yates v. Hendon

In re: RAYMOND B. YATES
Debtor

WILLIAM T. HENDON, Trustee — Conrad M. Troutman
Appellee — FTS 566-4004
423-566-6001
[COR LD NTC ret]
Troutman & Troutman
240 W. Central Avenue, Suite 10
P.O. Box 1757
LaFollette, TN 37766

v.

RAYMOND B. YATES, M.D., P.C. Profit Sharing Plan — William S. Lockett, Jr.
Appellant — FTS 524-1773
865-546-7311
[COR NTC ret]
James A. Holifield, Jr.
FTS 524-1773
865-546-7311
[COR LD NTC ret]
Kennerly, Montgomery & Finley
550 Main Avenue
Fourth Floor Nationsbank Center
Knoxville, TN 37902

RAYMOND B. YATES, Trustee — William S. Lockett, Jr.
Appellant — (See above)
[COR NTC ret]
James A. Holifield, Jr.

(See above)
[COR LD NTC ret]

00-6023 Yates v. Hendon

In re: RAYMOND B. YATES

Debtor

WILLIAM T. HENDON, Trustee

Appellee

v.

RAYMOND B. YATES, M.D., P.C. Profit Sharing Plan; RAYMOND B.
YATES, Trustee

Appellants

00-6023 Yates v. Hendon

8/7/00 Bankruptcy Case Docketed. Notice filed by Appellants Raymond B. Yates, Raymond B. Yates. Transcript needed: y (ac)

8/16/00 APPEARANCE filed by Attorney Conrad M. Troutman for Appellee William T. Hendon [00-6023] (ac)

8/18/00 APPEARANCE filed by Attorney James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates [00-6023] (ac)

8/18/00 PRE-ARGUMENT STATEMENT filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates [00-6023] (ac)

8/18/00 TRANSCRIPT ORDER FORM filed by James A. Holifield for Appellant Raymond B. Yates, Appellant Raymond B. Yates: reporter Elizabeth Coffey, transcript ordered on /16/00 [00-6023] [2209535-1] response due by 8/28/00 for Coffey [00-6023] (blh)

9/14/00 LETTER SENT by blh to Court Reporter Elizabeth Coffey regarding transcript. Transcript was ordered on 8/16/00; no confirmation. response due by 9/25/00 [00-6023] (blh)

9/20/00 Pre-Argument Conference work complete. (lmn)

9/22/00 TRANSCRIPT ORDER completed by court reporter Elizabeth Coffey for Document [2209535-1] transcript involving, James A. Holifield Jr., Elizabeth Coffey. Number of pages: 17 telephone conversation with ctr. [00-6023] (blh)

9/28/00 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 11/7/00; appellee brief due 12/7/00; reply brief 12/21/00; appendix due 12/28/00; final briefs due 1/18/01. [00-6023] (ac)

10/6/00 Record requested from district court. (ksc)

10/24/00 CERTIFIED RECORD filed . Volumes include 1 Tr; 1 w/2 expandables (bankruptcy) Pl. [00-6023] (ksc)

11/7/00 PROOF BRIEF filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates. Certificate of service date 11/7/00. Number of Pages: 60. [00-6023] • (ac)

11/7/00 Request to require oral argument filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates [00-6023] (ac)

12/7/00 PROOF BRIEF filed by Conrad M. Troutman for Appellee William T. Hendon. Certificate of service date 12/6/00 . Number of Pages: 33. [00-6023] • (ac)

12/7/00 Request to require oral argument filed by Conrad M. Troutman for Appellee William T. Hendon [00-6023] (ac)

12/21/00 PROOF REPLY BRIEF filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates Certificate service date 12/21/00 [00-6023] (ac)

12/21/00 APPENDIX filed by James A. Holifield for Appellants Raymond. Yates, Raymond B. Yates. Copies: 5. Certificate ofservice date 12/21/00 [00-6023] (ac)

1/17/01 FINAL BRIEF filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates. Copies: 7. Certificate service date 1/17/01 Number of Pages: 59. [00-6023] (ac)

1/17/01 Request to require oral argument filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates [00-6023] (ac)

1/17/01 FINAL REPLY BRIEF filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates. Copies: 7 Certificate of service date 1/17/01 Number of Pages: 12. [00-6023] (ac)

1/18/01 FINAL BRIEF filed by Conrad M. Troutman for Appellee William T. Hendon. Copies: 7. Certificate of service date 1/17/01 . Number of Pages: 33. [00-6023] (ac)

1/18/01 Request to require oral argument filed by Conrad M. Troutman for Appellee William T. Hendon [00-6023] (ac)

3/9/01 ADDITIONAL CITATION filed by James A. Holifield for Appellants Raymond B. Yates, Raymond B. Yates. Certificate service date none but served. [00-6023] (ac)

8/10/01 Oral argument date set for October 23, 2001 in court room 403. Notice of argument sent to counsel. [00-6023] (rld)

8/24/01 APPEARANCE filed by Attorney William S. Lockett for Appellants Raymond B. Yates, Raymond B. Yates [00-6023] (ac)

10/23/01 CAUSE ARGUED on 10/23/01 by William S. Lockett for Appellant Raymond B. Yates, Appellant Raymond B. Yates, Conrad M. Troutman for Appellee William T. Hendon before Judges Nelson, Clay, Garwood. [00-6023] (me)

4/19/02 OPINION filed: The judgment of the district court is AFFIRMED, decision for publication pursuant to local rule 206. [00-6023] David Nelson, Authoring Judge, Eric L. Clay, Will L. Garwood, Circuit Judges. (ac)

4/19/02 JUDGMENT: AFFIRMED. (ac)

5/3/02 PETITION for en banc rehearing filed by James A. Holifield for Appellant Raymond B. Yates. Certificate of service date 5/3/02. [00-6023] (blh)

5/9/02 LETTER SENT by blh to Conrad M. Troutman for Appellee William T. Hendon notifying that party is directed to respond to a petition for en banc rehearing [2546766-1] filed by James A. Holifield Jr. . Response due by 5/23/02. [00-6023] . (blh)

5/23/02 RESPONSE to a petition for en banc rehearing [2546766-1] filed by James A. Holifield Jr. . Response filed by Conrad M. Troutman for Appellee William T. Hendon. Certificate of service date 5/22/02. [00-6023] (blh)

6/20/02 ORDER filed denying petition for en banc rehearing [2546766-1] filed by James A. Holifield Jr. [00-6023]. David A. Nelson, Eric L. Clay, Will L. Garwood (5th Circuit), Circuit Judges. (blh)

6/28/02 MANDATE ISSUED with no cost taxed [00-6023] (ac)

7/15/02 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [00-6023] . Volumes included: 1 w/2 expandables Pl;. (ksc)

7/29/02 Record acknowledgment received from the district court. Acknowledged by: Angela Brush. Acknowledgment date: 7/26/02. [00-6023] (yh)

9/26/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Raymond B. Yates, Appellant Raymond B. Yates . Filed in the Supreme Court on 09-18-02 , Supreme Ct. case number: 02-458 . [00-6023] (swh)

7/7/03 U.S. Supreme Court letter filed granting petition for writ of certiorari [2622344-1] filed by Raymond B. Yates, Raymond B. Yates [00-6023] . Filed in the Supreme Court on 06-27-03 . (swh)

U.S. District Court

Eastern District of Tennessee (Knoxville)

CIVIL DOCKET FOR CASE #: 99-CV-600

Yates, et al v. Hendon, et al

Filed: 11/24/99
Assigned to: Honorable Curtis L Collier
Demand: $0,000
Nature of Suit: 422
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in Adv. Proc : is 98-3088
Dkt # in US Bankruptcy : is 96-34511
Cause: 28:0158 Notice of Appeal re Bankruptcy Matter

RAYMOND B YATES, Debtor
In re

James A Holifield, Jr
[COR LD NTC]
Kennerly, Montgomery & Finley, PC
P O Box 442
Knoxville, TN 37901-0442
865-546-7311

Donna W Temple, Chief Deputy Clerk
[COR LD NTC]
United States Bankruptcy Court
Howard H. Baker Jr. U.S. Courthouse
800 Market Street
Suite 330

Knoxville, TN 37902
865-545-4279

Richard S Stair, Jr
[COR LD NTC]
United States Bankruptcy Court
Howard H. Baker Jr. U.S. Courthouse
800 Market Street
Suite 330
Knoxville, TN 37902
865-545-4279

RAYMOND B YATES, M.D., P.C. Profit Sharing Plan
appellant

Craig J Donaldson
[COR]
James A Holifield, Jr
(See above)

[COR LD NTC]
Kennerly, Montgomery & Finley, PC
P O Box 442
Knoxville, TN 37901-0442
865-546-7311

RAYMOND B YATES, Trustee
appellant

Craig J Donaldson
(See above)
[COR]
James A Holifield, Jr
(See above)
[COR LD NTC]

v.

WILLIAM T HENDON, Trustee

C Mark Troutman

appellee [COR LD NTC]
Troutman & Troutman
P O Box 1757
Lafollette, TN 37766
423-566-6001

DOCKET PROCEEDINGS

DATE # DOCKET ENTRY

11/24/99 1 BANKRUPTCY RECORD ON APPEAL Sent R8007 letter (ab2) [Entry date 11/29/99]

12/14/99 2 APPELLANT's Brief by appellants Raymond B Yates, M.D., P.C. Profit Sharing Plan and Raymond B Yates, Trustee re [1-1] (Exhibits A-H attch) C/S (ab) [Entry date 12/15/99]

12/30/99 3 MOTION by appellee William T Hendon for an extension of time within which to file pla/appellee's brief (proposed order submitted) C/S (ab) [Entry date 01/05/00]

1/6/00 – REMARK: file sent to Chattanooga (ab) [Entry date 01/06/00]

1/10/00 4 APPELLEE's brief by appellee William T Hendon re [1-1] C/S (ab2) [Entry date 01/11/00]

1/13/00 – NOTICE OF HEARING mailed; In-court hearing set for 10:30 4/25/00 before Honorable Curtis L. Collier in Knoxville (cc: all counsel) (ab) [Entry date 01/13/00]

1/13/00 5 ORDER by Honorable Curtis L. Collier granting pla/appellee's motion for an extension of time within which to file pla/appellee's brief [3-1] until 1/10/00 (cc: all counsel) (ab) [Entry date 01/13/00]

1/19/00 6 MOTION by deft/appellant Raymond B Yates for extension of time through and including 1/27/00 to file reply brief C/S (proposed order submitted) (ab) [Entry date 01/20/00]

1/27/00 7 REPLY brief by appellants Raymond B Yates, MD, PC Profit Sharing Plan, and Raymond B Yates, Trustee re [1-1] C/S (w/attachments) (ab) [Entry date 01/28/00]

1/28/00 8 AGREED ORDER by Honorable Curtis L. Collier; granting dfts/appellant's motion for extension of time through and including 1/27/00 to file reply brief [6-1] (cc: all counsel) (aw) [Entry date 01/28/00]

4/25/00 9 MINUTES: (USDJ-Curtis Collier); In-court hearing held 4/25/00. Oral argument on bankruptcy appeal. Opinion to be issued. CD: Cyndee Holder; CR: Elizabeth Coffey (dhj) [Entry date 04/25/00]

6/26/00 – REMARK: File returned from Chattanooga (dhj) [Entry date 06/26/00]

6/26/00 10 MEMORANDUM by Honorable Curtis L. Collier in support of following order. (cc: all counsel) (dhj) [Entry date 06/27/00]

6/26/00 11 ORDER by Honorable Curtis L. Collier Affirming the findings of the Bankruptcy Court as to the following: Dr. Yates cannot participate in the Profit Sharing Plan under ERISA, and is ineligible to benefit from the protections of ERISA; Dr. Yate's interest in the Plan is not protected by the restriction on alienation contained in Tenn. Code Ann. 26-2-104(b); the Chapter 7 Trustee may recover, pursuant to 11 USC 550, avoidable transfers made by Dr. Yates to the Plan, to include the $50,467,46 loan repymt. The court AFFIRMS the Bankruptcy Court's grant of summary jgm in favor of Pla-Appellee and denies defts-Appellants' petition for reversal; dismissing case OB 178 Pg 91 (cc: all counsel) (dhj) [Entry date 06/27/00]

7/25/00 12 NOTICE OF APPEAL by appellant from Dist. Court decision [11-2], [10-1] (cc: all counsel) (dhj) [Entry date 07/28/00]

7/25/00 – RECEIVED appeal fee re [12-1] in amount of $ 105.00 (Receipt # 19382) (dhj) [Entry date 07/28/00]

7/28/00 – TRANSMISSION FORM - forwarding certified copies of notice of appeal, updated docket entries to USCA: [12-1] (cc: all counsel) (dhj) [Entry date 07/28/00]

8/3/00 13 STATEMENT OF ISSUES PRESENTED ON APPEAL by appellant and.... (dhj) [Entry date 08/08/00]

8/3/00 13 ....DESIGNATION of RECORD by appellant designating docts 1,2,4,7,9,10,11,12 C/S (dhj) [Entry date 08/08/00]

8/3/00 14 NOTICE by appellants of substitution of counsel noting that Al Holifield, Jr is counsel of record. C/S (dhj) [Entry date 08/08/00] [Edit date 08/21/00]

8/14/00 – NOTIFICATION by Circuit Court of Appellate Docket Number 00-6023 Case Mgr: Audrey Crockett (dhj) [Entry date 08/22/00]

8/18/00 15 DESIGNATION of RECORD by appellant designating docts: 1,2,4,7,9-12. C/S (dhj) [Entry date 08/22/00]

8/18/00 16 TRANSCRIPT Order by appellant Raymond B Yates, appellant Raymond B Yates for dates: 4/25/00 before Judge Collier (dhj) [Entry date 08/22/00]

8/21/00 – REMARK; File forwarded to Chattanooga per Annette for Elizabeth Coffey (dhj) [Entry date 08/21/00]

9/15/00 17 TRANSCRIPT of Oral Argumant held on April 25, 2000 before Judge Collier (Court Reporter Elizabeth Coffey) (aa) [Entry date 10/10/00]

9/27/00 – REMARK–file received by Knoxville office (aa) [Entry date 09/27/00]

10/10/00 – RECORD on Appeal sent to USCA re [12-1] (1) volume of pleadings; (1) transcript and (2) expandables (bankruptcy record) (entire file) (cc: all counsel) (dhj) [Entry date 10/10/00]

4/22/02 18 JUDGMENT from USCA affirming the decision of the District Court [12-1]; with slip opinion attached (aa) [Entry date 04/24/02]

7/1/02 19 MANDATE from USCA affirming the decision of the District Court; Appeal record returned ddl set for 8/1/02 (ab) [Entry date 07/01/02]

7/26/02 – RECORD on appeal returned from USCA consisting of 1 volume of pleadings, 1 transcript, and 2

expandable folders (bankruptcy record); appeal record returned ddl satisfied (ab) [Entry date 07/26/02]

8/5/02 – LETTER to USBC Clerk re: return of bankruptcy record (ab) [Entry date 08/05/02]

9/30/02 20 INFORMATIONAL COPY of Supreme Court letter of filing petition for writ of certiorari on 9/18/02. No. 02-458 (ab2) [Entry date 10/03/02]

7/9/03 21 LETTER from US Supreme Court that the petition for a writ of certiorari is granted (ab) [Entry date 07/10/03]

U.S. Bankruptcy Court

EASTERN DISTRICT OF TENNESSEE (Knoxville)

- *Bankruptcy Petition #:* 96-34511 *Date filed:* 12/2/96
- *Assigned to:* Judge Richard Stair, Jr.
- Chapter 7, involuntary, asset

* Parties *	* Attorneys *
RAYMOND B. YATES 2141 Pine Meade Road Knoxville, TN 37923 *SSN:* 435-54-3504 * Debtor *	**N. David Roberts, Jr.** P. O. Box 2189 Knoxville, TN 37901 865-546-3533
WILLIAM T. HENDON P.O. Box 23228 Knoxville, TN 37933-1228 * Trustee *	

Docket Proceedings

Date	Doc. No.	Docket Entry
12/2/96	1	Involuntary Petition. (Filing Fee $ 145.00 Receipt # 337680) (rjm) [EOD 12/04/96] [96-34511]
12/2/96	–	1 Summons(es) Issued on Raymond B. Yates (rjm) [EOD

		12/04/96] [96-34511]
12/4/96	2	Summons Served 12/3/96 on Raymond B. Yates. Involuntary Answer due on 12/23/96 for Raymond B. Yates MD (ldm) [EOD 12/06/96] [96-34511]
12/23/96	3	Motion By Debtor Raymond B. Yates To Dismiss Case . (ldm) [EOD 12/24/96] [96-34511]
12/31/96	4	Order to Set Hearing RE: [3-1] Motion To Dismiss Case by Raymond B. Yates MD scheduled For 9:00 2/6/97 at Ctrm 15th fl First TN Plaza; Creditors in addition to the petitioning creditor, NationsBank of Tennessee, NA, shall have through January 28, 1997, to join the involuntary petition. (ldm) [EOD 12/31/96] [96-34511]
1/2/97	5	Response By James A. McIntosh for Petitioning Creditor NationsBank of Tennessee, N.A. To [3-1] Motion To Dismiss Case by Raymond B. Yates MD . (ldm) [EOD 01/03/97] [96-34511]
1/6/97	6	Order (RS), that the February 6, 1997 hearing on the debtor's

		Motion to Dismiss will be an evidentiary hearing at which time the court will determine whether the debtor has twelve or more creditors. Paragraph one of the Order entered on December 3, 1996, fixing January 28, 1997, as the date by which additional creditors shall join the involuntary petition is VACATED. If the court determines at the February 6, 1997 hearing that the debtor, in fact, has twelve or more creditors it will, at that hearing, fix the date by which such creditors must join the petition. . (ldm) [EOD 01/06/97] [96-34511]
2/4/97	7	Amended List of Creditors . Filed by: Debtor Raymond B. Yates (ldm) [EOD 02/06/97] [96-34511]
2/5/97	8	Joinder of Petitioning Creditor Katherine Terry in Involuntary Petition. (ldm) [EOD 02/07/97] [Edit date 02/11/97] [96-34511]
2/5/97	9	Joinder of Petitioning Creditor William H. Brittain in Involuntary Petition. (ldm) [EOD 02/07/97] [Edit date 02/11/97] [96-34511]
2/6/97	–	Hearing Held Re: [3-1] Motion To Dismiss Case by Raymond B. Yates

		MD . Motion denied; Trial on contested involuntary petition set March 3, 1997, Debtor's Answer due February 13, 1997; Statement of Issues due 10 days prior to trial. Briefs due 7 days prior to trial. Order by the Court. (ldm) [EOD 02/06/97] [96-34511]
2/6/97	10	Order to Set Hearing RE: [1-1] on the Contested Involuntary Petition scheduled For 1:30 3/3/97 at Ctrm 15th fl First TN Plaza; The Debtor's Motion to Dismiss is Denied. The Debtor shall file his answer to the involluntary petition on or before February 13, 1997. The Debtor and petitioning creditors shall file a joint statement of all issues to be resolved by the court under the contested petition on or before February 21, 1997. The parties shall file brief in support of their respective theories on or before February 24, 1997. (ldm) [EOD 02/06/97] [Edit date 02/11/97] [96-34511]
2/12/97	11	Motion By Petitioning Creditor NationsBank of Tennessee, N.A. For Examination of Debtor Under Rule 2004 . (ldm) [EOD 02/13/97] [96-34511]

2/13/97	12	Answer of Raymond B. Yates to the involuntary petition would state that the petition should be dismissed in that the requisite number of petitioning creditors has not been met. (ldm) [EOD 02/14/97] [96-34511]
2/14/97	13	Order (RS) Granting [11-1] Motion For Examination of Debtor Under Rule 2004 by NationsBank of Tennessee, N.A. . (ldm) [EOD 02/14/97] [96-34511]
2/14/97	14	Motion By Petitioning Creditor NationsBank of Tennessee, N.A. For Summary Judgment . (ldm) [EOD 02/14/97] [96-34511]
2/14/97	15	Memorandum By Petitioning Creditor NationsBank of Tennessee, N.A. In Support Of [14-1] Motion For Summary Judgment by NationsBank of Tennessee, N.A. . (ldm) [EOD 02/14/97] [96-34511]
2/14/97	16	Notice By Debtor Raymond B. Yates To Take Deposition (ldm) [EOD 02/18/97] [Edit date 02/19/97] [96-34511]
2/18/97	17	Order (RS), That the court directs the Debtor to respond to the

		Motion for Summary Judgment filed February 14, 1997, by NationsBank of Tennessee, NA on or before February 26, 1997 . (ldm) [EOD 02/18/97] [Edit date 02/19/97] [96-34511]
2/20/97	18	Motion By Petitioning Creditor NationsBank of Tennessee, N.A. To Expedite Hearing Re: ([14-1] Motion For Summary Judgment by NationsBank of Tennessee, N.A.) . (ldm) [EOD 02/20/97] [96-34511]
2/20/97	19	Order (RS) Granting [18-1] Motion To Expedite Hearing Re: ([14-1] Motion For Summary Judgment by NationsBank of Tennessee, N.A.) Hearing set for 1:30 2/27/97 at Ctrm 15th fl First TN Plaza . (ldm) [EOD 02/20/97] [96-34511]
2/21/97	20	Statement of Issues by Petitioning Creditor William H. Brittain, Petitioning Creditor Katherine Terry, Petitioning Creditor NationsBank of Tennessee, N.A., Debtor Raymond B. Yates (ldm) [EOD 02/24/97] [96-34511]
2/24/97	21	Motion By Debtor Raymond B. Yates to strike or Modify Caption of Proceedings (ldm) [EOD

		02/24/97] [96-34511]
2/24/97	22	Brief By Petitioning Creditor NationsBank of Tennessee, N.A. In Support Of its position. (ldm) [EOD 02/24/97] [96-34511]
2/25/97	23	Affidavit of William H. Brittain (ldm) [EOD 02/26/97] [96-34511]
2/25/97	24	Motion By Debtor Raymond B. Yates For Summary Judgment and Response to Petitioner's Motion for Summary Judgment . (ldm) [EOD 02/26/97] [96-34511]
2/27/97	25	Order (RS) Granting [21-1] Motion to strike or Modify Caption of Proceedings by Raymond B. Yates MD . Caption of this case is changed to read RAYMOND B. YATES. (ldm) [EOD 02/27/97] [96-34511]
2/27/97	26	Order (RS) Granting [14-1] Motion For Summary Judgment by NationsBank of Tennessee, N.A. against the Debtor, Raymond B. Yates, is Sustained. Denying [24-1] Motion For Summary Judgment and Response to Petitioner's Motion for Summary Judgment by Raymond B. Yates MD . An Order

		for Relief is entered against the Debtor, Raymond B. Yates, under Chapter 7 of title 11 of the United States Code. (ldm) [EOD 02/27/97] [96-34511]
2/27/97	26	Order For Relief is entered against the Debtor, Raymond B. Yates ;Last Day to File Proof of Claim (gov): 8/26/97 (ldm) [EOD 02/27/97] [96-34511]
2/27/97	–	Hearing Held Re: [14-1] Motion For Summary Judgment by NationsBank of Tennessee, N.A. . Motion granted; Order by the Court. (ldm) [EOD 02/27/97] [96-34511]
2/27/97	27	Notice of Appointment of Trustee, William Hendon (cjc) [EOD 02/27/97] [96-34511]
3/6/97	28	Application By Trustee William T. Hendon To Employ C. Mark Troutman and McCord, Troutman & Irwin, P.C. . (ldm) [EOD 03/07/97] [96-34511]
3/10/97	29	Memorandum Opinion containing Findings of Fact and Conclusions of Law Re: [24-1] Motion For Summary Judgment and Response

		to Petitioner's Motion for Summary Judgment by Raymond B. Yates . (jgm) [EOD 03/10/97] [96-34511]
3/11/97	30	Order (RS) Granting [28-1] Application To Employ C. Mark Troutman and McCord, Troutman & Irwin, P.C. by William T. Hendon . (ldm) [EOD 03/11/97] [96-34511]
3/17/97	31	Notice of Appearance And Request For Service Of Notice By Tenn. Commissioner of Revenue (ldm) [EOD 03/18/97] [96-34511]
4/4/97	32	Order (RS), That the Order for Relief in this involuntary case having been entered under Chapter 7 on February 27, 1997, and the Debtor having failed to timely file his statements and schedules, the court accordingly directs that all statements and schedules be filed on or before April 15, 1997. . (ldm) [EOD 04/04/97] [96-34511]
4/11/97	–	Update Deadline ;Incomplete Filings Due on 4/15/97 for schedules and statment of affairs. (ldm) [EOD 04/11/97] [96-34511]
4/15/97	33	Disclosure of Compensation By Attorney For Debtor In the Amount

		of $ 150 an hour plus expenses. (ldm) [EOD 04/17/97] [96-34511]
4/15/97	34	Statement of Intent. (ldm) [EOD 04/17/97] [96-34511]
4/15/97	35	Schedules A - J (ldm) [EOD 04/17/97] [96-34511]
4/15/97	36	Statement of Financial Affairs. (ldm) [EOD 04/17/97] [96-34511]
4/22/97	–	Sec. 341 Meeting of Creditors scheduled For 12:00 5/13/97 At Meeting Room, Knoxville Last Day To Oppose Discharge: 7/14/97 ;Last Day to File Proofs Of Claim: 8/11/97 (rjm) [EOD 04/22/97] [96-34511]
4/22/97	37	Courts Certificate of Mailing Re: [0-0] First Meeting # of Notices: 76. (rjm) [EOD 04/22/97] [96-34511]
4/24/97	–	Sec. 341 Meeting of Creditors adjourned For 12:00 5/20/97 At Meeting Room, Knoxville (ldm) [EOD 04/25/97] [96-34511]
5/8/97	38	Notice of Appearance And Request For Service Of Notice By Anthony R. Steele for Creditor First Tennessee Bank, NA. (ldm) [EOD

		05/09/97] [96-34511]
5/20/97	–	Sec. 341 Meeting Held and Examination of Debtor ; Trustee's Report Due 10/31/97 . (vgs) [EOD 05/21/97] [96-34511]
5/28/97	39	Objection to Debtor's Claim of Exempt Property By Trustee William T. Hendon . (ldm) [EOD 05/29/97] [96-34511]
6/6/97	–	Hearing Re: [39-1] Exemption Objection by William T. Hendon scheduled For 9:00 6/19/97 at Ctrm 15th fl First TN Plaza (lsd) [EOD 06/06/97] [96-34511]
6/6/97	40	Courts Certificate of Mailing Re: [0-0] Hearing on Objectino by Trustee to Exemptions # of Notices: 7. (ldm) [EOD 06/06/97] [96-34511]
6/18/97	41	Amended [39-1] Exemption Objection . Filed by: Trustee William T. Hendon (ldm) [EOD 06/18/97] [96-34511]
6/19/97	–	Hearing called Re: [39-1] Exemption Objection by William T. Hendon . Objection adjourned indefinitely to be reset on request

		of either party. Order by the Court. (ldm) [EOD 06/20/97] [96-34511]
6/20/97	42	Order (RS), Upon consideration of the Trustee's Objection to Debtor's Claim of Exempt Property filed by the Chapter 7 Trustee, William T. Hendon, objecting to the Debtor's claimed exemption and after notice and a hearing held June 19, 1997, upon agreement of the parties, the court directs that the hearing on the Trustee's Objection is adjourned indefinitely, to be reset at the request of either of the Debtor or Trustee . (ldm) [EOD 06/20/97] [96-34511]
6/20/97	43	Application By Baker, Donelson and Caldwell James A. McIntosh for Petitioning Creditor NationsBank of Tennessee, N.A. For Compensation (Fees: $ 6,463.03,) incurred in connection with the filing of an involuntary bankruptcy petition . (ldm) [EOD 06/23/97] [96-34511]
6/25/97	–	Hearing Re: [43-1] Application For Compensation (Fees: $ 6,463.03,) incurred in connection with the filing of an involuntary bankruptcy petition by James A. McIntosh scheduled For 9:00 7/17/97 at Ctrm

		15th fl First TN Plaza (lsd) [EOD 06/25/97] [96-34511]
6/26/97	44	Courts Certificate of Mailing Re: [0-0] Hearing on application by petitioning creditor Nationsbank of Tennessee, N.A. to allow attorneys fees and expenses for Baker, Donelson, Bearman and Caldwell # of Notices: 81. (cjr) [EOD 06/26/97] [96-34511]
7/11/97	45	Motion By Trustee William T. Hendon To extend Time To file Sec. 727 Complaint . (ldm) [EOD 07/14/97] [96-34511]
7/17/97	–	Hearing Held Re: [43-1] Application For Compensation (Fees: $ 6,463.03,) incurred in connection with the filing of an involuntary bankruptcy petition by James A. McIntosh . Order by the Court. (ldm) [EOD 07/18/97] [96-34511]
7/18/97	46	Order (RS) Granting [43-1] Application For Compensation (Fees: $ 6,463.03,) incurred in connection with the filing of an involuntary bankruptcy petition by James A. McIntosh payment to Baker, Donelson, Bearman and Caldwell of $6463.03 in fees and

		$145.00 in expenses . (ldm) [EOD 07/18/97] [96-34511]
7/21/97	–	Hearing Re: [45-1] Motion To extend Time To file Sec. 727 Complaint by William T. Hendon scheduled For 9:00 8/7/97 at Ctrm 15th fl First TN Plaza (tmr) [EOD 07/21/97] [96-34511]
7/21/97	47	Courts Certificate of Mailing Re: [0-0] Hearing on Motion by Trustee to Extend the Sec. 727 Deadline # of Notices: 6. (ldm) [EOD 07/21/97] [96-34511]
8/7/97	–	Hearing called Re: [45-1] Motion To extend Time To file Sec. 727 Complaint by William T. Hendon . Deadline extended to October 16, 1997, Agreed Order to be submitted. (ldm) [EOD 08/08/97] [96-34511]
8/11/97	48	Agreed Order (RS) Granting [45-1] Motion To extend Time To file Sec. 727 Complaint by William T. Hendon ; Last Day to Oppose Discharge: 10/14/97 . (ldm) [EOD 08/11/97] [96-34511]
10/21/97	49	Order Discharging Debtor Raymond B. Yates. (ldm) [EOD

		10/21/97] [96-34511]
10/24/97	50	BNC Certificate of Service [49-1] Discharge Order by Raymond B. Yates . (ldm) [EOD 10/28/97] [96-34511]
1/27/98	51	Trustee's Interim Report. Trustee's Report Due 4/30/98 (ldm) [EOD 01/28/98] [96-34511]
4/16/98	52	Trustee's Interim Report. Trustee's Report Due 11/2/98 (ldm) [EOD 04/20/98] [96-34511]
8/5/98	–	Complaint (98-3088) William T. Hendon, Trustee vs. Raymond B. Yates, MD PC, Profit Sharing Plan, Raymond B. Yates and/or Quick & Reilly, Plan Administrator/Plan Trustee NOS 454 Recover Money/Property . (jgm) [EOD 08/07/98] [98-3088]
11/4/99	53	Motion By Trustee William T. Hendon To Compel Turnover of Property of the Estate . (sjp) [EOD 11/04/99] [96-34511]
11/4/99	54	Brief By Trustee William T. Hendon In Support Of [53-1] Motion To Compel Turnover of Property of

		the Estate by William T. Hendon . (sjp) [EOD 11/04/99] [96-34511]
11/10/99	–	Hearing Re: [53-1] Motion To Compel Turnover of Property of the Estate by William T. Hendon scheduled For 9:00 12/2/99 at Ctrm 1C Baker Crths Knox (jgm) [EOD 11/10/99] [96-34511]
11/12/99	55	Courts Certificate of Mailing Re: [0-0] Hearing on Motion by Trustee to Compel Turnover of Property # of Notices: 8. (cjr) [EOD 11/12/99] [96-34511]
11/24/99	56	Transmission of Record on Appeal to District Court RE: Notice of Appeal filed 9/13/99 in Adv. Proc. No. 98-3088. (jgm) [EOD 11/24/99] [96-34511]
11/24/99	57	Response By Raymond B. Yates, M.D., P.C., Profit Sharing Plan To [53-1] Motion To Compel Turnover of Property of the Estate by William T. Hendon; with affidavit of Dale Horst. (vgs) [EOD 11/29/99] [96-34511]
12/2/99	–	Hearing called Re: [53-1] Motion To Compel Turnover of Property of the Estate by William T. Hendon

		adjourned For 9:00 12/9/99 at Ctrm 1C Baker Crths Knox (mmd) [EOD 12/03/99] [96-34511]
12/9/99	–	Hearing called Re: [53-1] Motion To Compel Turnover of Property of the Estate by William T. Hendon; agreed order to be submitted adjourning motion indefinitely pending resolution of appeal and providing for the submission of written staus reports at 90 day intervals. (vgs) [EOD 12/13/99] [96-34511]
1/14/00	58	Order (rs), Re: Motion to Compel Turnover of Funds filed by trustee and Response; trial of this contested matter to be resolved in adv. proc. 98-3088, which is on appeal to U.S. District Court; matter is stayed pending resolution; commencing March 1, 2000 parties shall submit a status report on the appeal and continuing each ninety days reporting on status of appeal of adversary proceeding; debtor shall be prohibited from making any transactions relative to the debtor's interest in pension account; Raymond B. Yates, M.D., P.C. Pension and Profit Sharing Plan shall provide to trustee copies of

		documents evidencing current balance in Plan with such documentation to be submitted within thirty days from the date of this Order; the Plan represents that the debtor's interest is federally insured and the Plan shall maintain investments made within the Plan for and on account of debtor's interest in federally insured accounts pending futher orders by the court . (vgs) [EOD 01/14/00] [96-34511]
3/3/00	59	Status Report by Trustee William T. Hendon on the Adversary Proceeding 98-3088. (ldm) [EOD 03/06/00] [96-34511]
6/19/00	60	Status Report by Trustee William T. Hendon on the adversary 98-3088. (ldm) [EOD 06/21/00] [96-34511]
6/26/00	61	Memorandum containing Findings of Fact and Conclusions of Law Re: Notice of Appeal filed 9/13/99 in Adv. Proc. No. 98-3088. (jgm) [EOD 06/29/00] [96-34511]
6/26/00	62	Final Order By Judge Collier in accordance the the Memorandum filed 6/26/00 affirming the decision of the bankruptcy court in Adv.

		Proc. No. 98-3088. (jgm) [EOD 06/29/00] [96-34511]
7/25/00	63	Notice Of Appeal to the United States Court of Appeals for the Sixth Circuit RE: [62-1] District Court Order and Memorandum dated June 27, 2000 filed in Adv. Proc. No. 98-3088. (jgm) [EOD 08/01/00] [96-34511]
3/5/01	64	Order (rs), that the court, on its own motion, directs that counsel for the Trustee and counsel for Raymond B. Yates, M.D., P.C., Pension and Profit Sharing Plan and Raymond B. Yates, Trustee, comply with the court's January 14, 2000 Order within ten days requiring them to file a status report regarding the appeal of Adversary Proceeding No. 98-3088 . (ldm) [EOD 03/05/01] [96-34511]
3/9/01	65	Status Report by Trustee William T. Hendon on Adversary No. 98-3088. (nah) [EOD 03/12/01] [96-34511]
6/12/01	66	Status Report by Trustee William T. Hendon (sjp) [EOD 06/13/01] [96-34511]
9/27/01	67	Status Report by Trustee William T.

		Hendon (vmg) [EOD 09/28/01] [96-34511]
4/19/02	69	Judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the district court re: Notice of Appeal filed 9/13/99 in Adv. Proc. No. 98-3088. (jgm) [EOD 05/01/02] [96-34511]
4/26/02	68	Status Report by Trustee William T. Hendon (ldm) [EOD 04/30/02] [96-34511]
6/5/02	70	Motion By Trustee William T. Hendon To continue Hearing On: Status Conference . (ldm) [EOD 06/11/02] [96-34511]
8/14/02	–	Hearing Re: Status Hearing Set For 9:00 8/29/02 at Ctrm 1C Baker Crths Knox (dcs) [EOD 08/14/02] [96-34511]
8/19/02	71	BNC Certificate of Service [0-0] Status Conference. (vmg) [EOD 08/23/02] [96-34511]
8/23/02	72	Motion By Debtor Raymond B. Yates in 96-34511 To continue Hearing On: ([0-0] status

		conference) . (vmg) [EOD 08/23/02] [96-34511]
8/28/02	73	Order (rs) Granting [72-1] Motion To continue Hearing On: ([0-0] status conference) by Raymond B. Yates Status Reset To 1:30 11/14/02 at Ctrm 1C Baker Crths Knox . (vmg) [EOD 08/28/02] [96-34511]
3/28/03	74	Application By Trustee William T. Hendon To Employ John A. Walker for special purposes . (sjp) [EOD 03/31/03] [96-34511]
4/4/03	75	Order (rs) Granting [74-1] Application To Employ John A. Walker for special purposes by William T. Hendon (NUNC PRO TUNC to October 1, 2002) . (sjp) [EOD 04/04/03] [96-34511]
4/8/03	76	BNC Certificate of Service [75-1] Order . (vmg) [EOD 04/10/03] [96-34511]
5/2/03	77	Assignment of Claim of Creditor NationsBank of Tennessee, N.A. to Great Plains Capital Corporation (vmg) [EOD 05/06/03] [96-34511]
6/30/03	78	Status Report by Trustee William T.

(27D)

29

Supreme Court, U.S.
FILED
AUG 11 2003
OFFICE OF THE CLERK

No. 02-458

In the

Supreme Court of the United States

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

James A. Holifield, Jr.
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PETITION FOR WRIT FILED SEPTEMBER 18, 2002
CERTIORARI GRANTED JUNE 27, 2003

QUESTIONS PRESENTED

The issue before this Court is whether a one hundred percent (100%) shareholder of a corporate employer, a partner or a sole proprietor can qualify as a "participant" in an "employee benefit plan" as those terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA") and thus be entitled to enforce the restriction against alienation contained in 29 U.S.C. § 1056(d) of ERISA and 26 U.S.C. § 401(a)(13) of the Internal Revenue Code.

PARTIES TO THE PROCEEDING

PETITIONERS - APPELLANTS

(1) Raymond B. Yates, M.D., P.C. Profit Sharing Plan
(2) Raymond B. Yates, Trustee

RESPONDENT - APPELLEE

(1) William T. Hendon, Bankruptcy Trustee

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OPINIONS BELOW

The judgment and memorandum of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, Adversary Proceeding No. 98-3088, was issued on September 2, 1999, and is unreported. (Petition App. 36a-50a).[1] The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, was issued on June 26, 2000, and is unreported. (Petition App. 9a-35a). The April 19, 2002, opinion of the Court of Appeals for the Sixth Circuit affirming the district court opinion is published at 287 F.3d 521 (6th Cir. 2002). (Petition App. 1a-8a). The order of the Court of Appeals for the Sixth Circuit denying rehearing en banc is published at 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). (Petition App. 51a-52a).

STATEMENT OF JURISDICTION

The September 2, 1999, opinion of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, granted the Bankruptcy Trustee's Motion for Summary Judgment and denied Raymond B. Yates ("Yates") and the Raymond B. Yates, M.D., P.C. Profit Sharing Plan's Motion for Summary Judgment. The United States District Court for the Eastern District of Tennessee affirmed this decision on June 26, 2000. On April 19, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court. Yates and the Profit Sharing Plan filed a Petition for Rehearing En Banc with the Sixth Circuit Court of Appeals, which was denied on June 20, 2002. A Petition for Writ of

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[1] The Appendix to Petition for Writ of Certiorari, filed September 18, 2002, is referred hereinafter as "Petition App." followed by the page number.

Certiorari to the United States Supreme Court was filed on September 18, 2002, and was granted on June 27, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(2), 1002(3), 1002(6), 1002(7) and 1056(d) (2003), the Internal Revenue Code 26 U.S.C. § 401(a)(13) (2003), and 29 C.F.R. § 2510.3-3 (2003).

STATEMENT OF THE CASE

Raymond B. Yates, M.D., P.C. (the "Yates, P.C.") is a Tennessee professional corporation wholly owned by Yates. (JA 15a).[2] Effective as of July 1, 1989, Yates, P.C. created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the "Profit Sharing Plan"), which is an "employee benefit plan" as defined in 29 U.S.C. § 1002(2) of ERISA and qualified for tax purposes under 26 U.S.C. § 401 of the Internal Revenue Code.[3] (JA 32a-65a). In addition to being the sole shareholder of Yates, P.C. and the administrator and trustee of the Profit Sharing Plan, Yates participated in the Profit Sharing Plan as an employee of Yates, P.C. (JA 32a-255a, 264a-267a, 268a). From the time of its inception, the Profit Sharing Plan always had at least one employee participant who was not Yates or Yates' spouse. (JA 264a-267a, 269a). As of June 30, 1996, there were three participants in the Profit Sharing Plan in addition to Yates, none of who was Yates' spouse. *Id.*

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[2] The Joint Appendix is referred hereinafter as "JA" followed by the page number.

[1] Also, effective as of July 1, 1989, Yates, P.C. created the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan ("Money Purchase Plan") in which Yates also participated.

In his capacity as an employee-participant in the Money Purchase Plan, Yates borrowed against his interest in the Money Purchase Plan under the "Model Loan Program." On December 13, 1989, Yates executed a promissory note in the principal amount of $20,000.00 at an eleven percent rate of interest with a five-year repayment period, which was extended for another five years on June 12, 1992, when the loan was transferred to the Profit Sharing Plan. (JA 259a-260a, 268a). Also on December 13, 1989, Yates executed an irrevocable pledge and assignment to secure the indebtedness to be repaid under the promissory note. (JA 261a-262a). In the irrevocable pledge and assignment, Yates pledged and assigned to the trustee of the Money Purchase Plan an interest in his vested account balance. *Id.* This loan was transferred to the Profit Sharing Plan in 1992, when the Money Purchase Plan merged into the Profit Sharing Plan. The Profit Sharing Plan contains a "spendthrift clause" that protects the assets of the Profit Sharing Plan from assignment or alienation as provided in 29 U.S.C. § 1056(d) of ERISA and 26 U.S.C. § 401(a)(13) of the Internal Revenue Code.

In November 1996, Yates repaid the entire debt to the Profit Sharing Plan by making two payments. (Petition App. 39a). Together, the payments totaled $50,467.46 and represented the total amount of principal and interest due under the promissory note. (JA 269a). After these repayments, Yates' interest in the Profit Sharing Plan was approximately $87,000. (Petition App. 39a). On December 2, 1996, an involuntary petition under Chapter 7, Title XI of the United States Code was filed against Yates. (JA 31a). Yates claimed his entire interest in the Profit Sharing Plan as exempt property on Schedule B of his bankruptcy schedules under ERISA, the Internal Revenue Code and Tenn. Code Ann. § 26-2-104(b). *Id.*

On August 5, 1998, the Bankruptcy Trustee filed an adversary proceeding against the Profit Sharing Plan and Yates, as the Profit Sharing Plan's trustee, seeking to void as a preference under 11 U.S.C. § 547(b) the $50,467.46 loan repayments made by Yates to the Profit Sharing Plan in November 1996. (JA 1a-3a). However, the Profit Sharing Plan and Yates asserted that the Bankruptcy Trustee could not recover these payments because such payments represented Yates' interest in an ERISA-qualified plan and were excluded from his bankruptcy estate based on *Patterson v. Shumate*, 504 U.S. 753 (1992). (JA 6a).

The parties to the adversary proceeding filed cross motions for summary judgment. The bankruptcy court granted the Bankruptcy Trustee's Motion for Summary Judgment and denied the Profit Sharing Plan and Yates' Motion for Summary Judgment. (Petition App. 36a-50a). Specifically, the bankruptcy court ruled that the Bankruptcy Trustee could recover the November 1996 payments Yates made to the Profit Sharing Plan because Yates was not an "employee" as defined in ERISA eligible to participate in the Profit Sharing Plan. The bankruptcy court specifically stated the following:

> The Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest in the Defendant Plan.

(Petition App. 43a-44a). This holding was based on the decision of the Sixth Circuit Court of Appeals in

Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993), which held that "a sole proprietor or sole shareholder of a business must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Id.* at 186.

The United States District Court for the Eastern District of Tennessee at Knoxville affirmed the decision of the bankruptcy court and further stated that "[w]hile the Plan may be ERISA-qualified as to other participants, . . . it is not ERISA-qualified as to Dr. Yates."[1] (Petition App. 14a). On April 19, 2002, the Court of Appeals for the Sixth Circuit affirmed the decisions of the lower courts stating, "[u]nder circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA. Neither is the spendthrift clause enforceable under Tennessee statutory law." *Yates*, 287 F.3d at 526. The Sixth Circuit held

> [o]ur published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992). As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000).

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[1] There is no basis in ERISA to conclude that an employee benefit plan can have two categories of participants (owners and non-owners) in the same plan that are subject to two different legal enforcement schemes.

> The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms." *Agrawal*, 205 F.3d at 302.

Yates, 287 F.3d at 525.

Yates and the Profit Sharing Plan timely filed a Petition for Rehearing En Banc that was denied by the United States Court of Appeals for the Sixth Circuit on June 20, 2002. *Hendon v. Yates (In re Yates)*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), *cert. granted*, 2003 U.S. LEXIS 5033 (U.S., June 27, 2003). (Petition App. 51a-52a). Yates and the Profit Sharing Plan filed a Petition for Writ of Certiorari to this Honorable Supreme Court that was granted on June 27, 2003.

SUMMARY OF THE ARGUMENT

Under the Bankruptcy Code, property of the debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law" is excluded from the debtor's bankruptcy estate. 11 U.S.C. § 541(c)(2). This Court in *Patterson* held that ERISA is "applicable nonbankruptcy law" and that the anti-alienation provisions within ERISA-qualified pension plans are enforceable, excluding a debtor's interest in such a plan from the bankruptcy estate. The Bankruptcy Trustee in this case is attempting to alienate Yates' interest in the Profit Sharing Plan.

Yates, P.C. is an "employer" that is eligible to sponsor an "employee benefit plan" pursuant to the definition of these terms in ERISA. Yates is an "employee" as that term is defined in 29 U.S.C. § 1002(6) based on the analysis set forth by this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318

(1992) and Department of Labor ("DOL") guidance on this issue. Since Yates is an "employee," he is eligible to be a "participant" for purposes of ERISA under 29 U.S.C. § 1002(7) and is entitled to the anti-alienation protection as provided in *Patterson*.

The Sixth Circuit in *Yates* incorrectly held that the holding of *Patterson* did not apply because Yates was not an "employee" as defined in ERISA and therefore not a "participant" in an ERISA-qualified pension plan. The Sixth Circuit's ruling is based on an erroneous interpretation of 29 C.F.R. § 2510.3-3. In addition, the holding in *Yates* ignores this Court's ruling in *Darden* regarding the determination of whether an individual is an "employee" for purposes of ERISA and conflicts with the definition of "employee benefit plan" as defined in DOL Regulation 29 C.F.R. § 2510.3-3, other case law from circuit courts of appeals and DOL opinion letters.

ARGUMENT

YATES IS A PARTICIPANT IN AN EMPLOYEE BENEFIT PLAN AS DEFINED IN 29 U.S.C. § 1002(3).

A. Yates, P.C. Sponsored an Employee Benefit Plan Covered by ERISA and the Internal Revenue Code.

ERISA was enacted to

> protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial

> and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C.§ 1001(b).

ERISA shall apply to "any employee benefit plan if it is established or maintained – (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . . ." 29 U.S.C. § 1003(a)(1). An "employer" is defined under ERISA as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). A "person" is defined as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

An "employee benefit plan" is defined as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). The DOL regulations further define and explain the definition of an "employee benefit plan" in 29 C.F.R. § 2510.3-3. This regulation is entitled "employee benefit plan," and the numbering of this regulation corresponds to § 3(3) of ERISA, 29 U.S.C. 1002(3), which is the statutory definition of the term "employee benefit plan." DOL Regulation 29 C.F.R. §

2510.3-3(a), (b) and (c) provide the rules for determining whether an employee benefit plan exists:

> (a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.
>
> (b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are

participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. § 2510.3-3(a), (b) and (c).

It is clear from a plain reading of this regulation that Yates should not be excluded from being a participant in the Profit Sharing Plan that Yates P.C. sponsored because other non-owner employees participated in the Profit Sharing Plan.[5] The regulation

[5] It is interesting to note that the district court stated "[w]hile the plan may be ERISA-qualified as to other participants, the Court found it is not ERISA qualified as to Dr. Yates. Dr. Yates may have been participating in the plan, but his participation in the plan was not under ERISA." (Petition App. 14a.) Therefore, the district court recognized that there was an employee benefit plan covered by

specifically states that where one or more common law employees participate in a plan in addition to the "self-employed individual," the plan is covered under Title I of ERISA. Furthermore, this regulation never contemplates an employee benefit plan being subject to two separate enforcement schemes – ERISA as to the "ERISA participants" and state law as to the "non-ERISA participants."[6]

An "employee pension benefit plan" is defined as

. . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

ERISA but simply held that Yates was not a participant in such plan.

[6] As discussed *supra*, such a result would lead to absurd results that this Court warned against in *Darden*.

Yates, P.C. is a professional corporation organized under the laws of the State of Tennessee and is an "employer," as defined by 29 U.S.C. § 1002(5) in that it is a "person" acting directly as the employer for at least four employees since the inception of the Profit Sharing Plan. 29 U.S.C. § 1002(9). Yates, P.C. sponsored the Profit Sharing Plan, which is an "employee benefit plan" in that it provides "retirement income to employees." 29 U.S.C. § 1002(2). Therefore, the Profit Sharing Plan established by Yates, P.C. was and is subject to the terms of ERISA and the Internal Revenue Code.[7]

B. Yates Was and Is an Employee of Yates, P.C. and a Participant in the Profit Sharing Plan

ERISA defines the term "participant" as

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). In *Darden*, this Court stated that this definition of

[7] 29 U.S.C. §§ 1003, 1051, 1081 and 1101 provide certain exceptions to ERISA coverage; however, none of these exceptions are applicable to Yates, P.C. and the Profit Sharing Plan.

employee in ERISA is "completely circular and explains nothing" and went on to hold that "the term 'employee' as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 834, 29 U.S.C. § 1002(6)" should be read "to incorporate traditional agency law criteria for identifying master-servant relationships." *Darden*, 503 U.S. at 319 (1992). *Darden* went on to explain the following:

> where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323, 95 S.Ct. 472, 475-476, 42 L.Ed.2d 498 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94, 35 S.Ct. 491, 494, 59 L.Ed. 849 (1915).

Id. at 322-23 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)).

Based on *Darden's* common law definition of "employee," Yates is an employee of Yates, P.C. In fact, the district court found that "Yates participated in the

Plan as an employee." (Petition App. 10a). It is undisputed that Yates was a W-2 employee of Yates, P.C. since the creation of the Profit Sharing Plan. Yates' status as the sole shareholder of Yates, P.C. and an employee does not militate against his status as a participant in the Profit Sharing Plan.

Tennessee law recognizes the distinction between a corporate entity and its shareholder/employees. *Hadden v. City of Gatlinburg*, 746 S.W.2d 687, 689 (Tenn. 1988); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 115 (Tenn. Ct. App. 1993), *perm. to appeal denied* (1994). Such separation supports Yates' argument that he can be the sole shareholder of Yates, P.C. and, at the same time, be viewed separately by law as an employee of that entity.

The Profit Sharing Plan provides that any "employee" over the age of 21 who has completed one year of service is "eligible" to participate in the Profit Sharing Plan. (JA 37a, 110a-111a). The trust financial reports of the Profit Sharing Plan indicate that Yates met the eligibility provisions of the Profit Sharing Plan and that Yates was a participant. (JA 264a-267a). Contributions were made to the Profit Sharing Plan by Yates, P.C. based on Yates' compensation, which is defined in the Profit Sharing Plan as "W-2 compensation." (JA 48a, 93a.) Therefore, Yates was an "employee" of Yates, P.C. and a "participant" in the Profit Sharing Plan.[8]

[8] There is nothing in the record to indicate that Yates was anything other than an employee of Yates, P.C. The only basis for determining that Yates was not an employee of Yates, P.C. is the Sixth Circuit's misreading of 29 C.F.R. § 2510.3-3, which will be addressed *supra*.

C. Several Provisions of ERISA and the Internal Revenue Code Provide for Working Owners, such as Yates, to Be Employees and Participants in Employee Benefit Plans

ERISA, 29 U.S.C. § 1103(a), generally requires that all assets in an employee benefit plan be held in trust. However, 29 U.S.C. § 1103(b)(3)(A) contains an exception to this requirement for a plan if some or all of the participants are employees as described in 26 U.S.C. § 401(c)(1). Internal Revenue Code § 401(c)(1) [26 U.S.C. § 401(c)(1)] defines the term "employee" as including a self-employed individual, such as Yates, that has earned income from self-employment with respect to a trade or business of which the "personal services of the individual are a material income-producing factor." 26 U.S.C. §§ 401(c)(1)(B) and (2)(A), 1402(a) and (c). By adopting the definition of "employee" found in 26 U.S.C. § 401(c), Congress made it clear that both ERISA and the Internal Revenue Code intentionally provide for working owners of a business to participate in an employee benefit plan.

1. Statutory Provisions Related to Title I of ERISA Recognize That Working Owners May Be Participants in Tax-Qualified Pension Plans.

Internal Revenue Code § 401 [26 U.S.C. § 401] sets forth the tax rules to maintain a qualified plan. An "employee" under 26 U.S.C. § 401(c), which defines self-employed individuals and owner-employees, would qualify to both participate in a qualified plan and to obtain the same tax benefits that non-owner employees receive. 26 U.S.C. § 401(a). Other examples supporting this contention include the Revenue Act of 1942, which

allowed corporate shareholders to participate in tax-qualified pension plans. Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 862 (former 26 U.S.C. § 165(a)(4)). Further evidence is contained in the Self-Employed Individuals Tax Retirement Act of 1962, which authorized the creation of "Keogh" plans to allow partners and sole proprietors "access to retirement plans on a reasonably similar basis to that accorded corporate shareholder employees." Pub. L. No. 87-792, 76 Stat. 809; S. REP. NO. 992, 87th Cong., 1st Sess. 8 (1961). Each of these statutory provisions evidence Congress' intent that working owners may be participants in ERISA employee benefit plans. If working owners were not allowed to participate in ERISA employee benefit plans, Congress' intent to consider working owners as employees under 26 U.S.C. § 401 would be thwarted.

2. Title IV of ERISA Expressly Recognizes Participation by a Sole Shareholder of a Corporate Employer in an Employee Benefit Plan.

Title IV of ERISA generally applies to "employee pension benefit plans" as defined in 29 U.S.C. § 1002(2). 29 U.S.C. § 1321(a). The plan cannot be an individual account plan and must meet the requirements of Internal Revenue Code § 401 [26 U.S.C. § 401]. 29 U.S.C. § 1321. Title IV of ERISA generally covers plans wherein substantial owners and other employees collectively participate. *See* 29 U.S.C. 1322(b)(5)(B) (referring to substantial owners as participants in an employee benefit plan). If the plan is established and maintained *solely* for "substantial owners," it is excepted from Title IV coverage. 29 U.S.C. 1321(b)(9). "Substantial owners" of a corporation are those who own more than ten percent of the stock in a corporation, which naturally

includes sole shareholders. 29 U.S.C. 1322(b)(5)(A)(iii). This reference to "substantial owners" as participants in ERISA employee benefit plans by definition includes sole shareholders such as Yates.

3. DOL Advisory Opinions Support Yates and the Profit Sharing Plan's Interpretation of ERISA and Its Regulations

In DOL Opinion Letter 79-08A, the DOL was asked to issue an advisory opinion regarding whether a partner's wife was eligible to be a participant in an employee benefit plan sponsored by her husband's company where she was employed. In rendering its opinion that the wife was a participant in the plan, the DOL stated that 29 C.F.R. § 2510.3-3

> is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of

> the Fund as properly administered according to all applicable laws and plan documents.

DOL Opinion Letter 79-08A, Jan. 30, 1979. (JA 271a-273a).

The DOL has also issued an advisory opinion recognizing that "working owners" of businesses can be participants in employee benefit plans sponsored by their business. In DOL Opinion Letter 99-04A, the DOL addressed the issue of whether individuals who own business enterprises, either as sole proprietors, partners or shareholders, and who provide personal services to those businesses may be "participants" under ERISA. In concluding that such individuals could be participants, the DOL stated as follows:

> In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of

> ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

DOL Opinion Letter 99-04A, Feb. 4, 1999. (JA 274a-283a).

Furthermore, the Internal Revenue Code recognizes plans that benefit owner/employees as participants and affords such owner/employees the same treatment as non-owner employees. Internal Revenue Code § 401(a)(10) states that in the case of any plan that provides contributions or benefits for owner/employees, the trust that forms part of the plan shall constitute a qualified trust if other sections of the Internal Revenue Code are met. 26 U.S.C. § 401(a)(10). Under Internal Revenue Code § 401(a)(13) such a trust must contain an anti-alienation provision similar to that required under ERISA. 26 U.S.C. § 401(a)(13). Therefore, a trust which comprises an employee benefit plan that provides benefits to owner/employees as participants and that contains an anti-alienation provision is considered a qualified trust and entitled to special tax treatment under the Internal Revenue Code. Obviously such a statutory scheme assumes that owner/employees can be participants in such plans despite their ownership interest in the plan sponsor.

It is evident from the text of ERISA and related statutory provisions that Congress intended working owners to be "participants" in ERISA employee benefit plans. As a sole shareholder and working owner of Yates, P.C., Yates is an "employee" and therefore a "participant" of an ERISA employee benefit plan. The Sixth Circuit's holding that a sole shareholder cannot be considered an "employee" and "cannot qualify as a

'participant' . . . in an ERISA pension plan" ignores the specific guidance provided in the statute and by this Court which "thwart[s] the congressional design" of ERISA. *Yates*, 287 F.3d at 525; *Darden*, 503 U.S. at 323.

THE DECISION OF THE SIXTH CIRCUIT IN *YATES* ERRONEOUSLY INTERPRETS ERISA AND APPLICABLE AGENCY REGULATIONS AND IGNORES THIS COURT'S HOLDING IN *DARDEN*.

A. The Sixth Circuit Decision in *Yates* Is Erroneous

In *Yates*, the Sixth Circuit Court of Appeals held that Yates could not enforce the spendthrift clause contained in the Profit Sharing Plan because he was not a participant or beneficiary under ERISA due to his status as the sole shareholder of Yates, P.C. *Yates*, 287 F.3d at 525. This holding is based solely on circuit precedent as pronounced in *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993), and *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000), *reh'g. denied*, 2000 U.S. App. Lexis 6844 (6th Cir. April 6, 2000). The Sixth Circuit in *Fugarino* held that "a sole proprietor or sole shareholder of a business must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Fugarino*, 969 F.2d at 186. In *Agrawal*, the court relied on the *Fugarino* decision and went further to hold that a sole shareholder, as an "employer," cannot qualify as a participant or beneficiary in an ERISA employee benefit plan and hence does not have standing to enforce the provisions of ERISA. *Agrawal*, 205 F.3d at 302. The *Fugarino* court relied significantly on its interpretation of 29 C.F.R. § 2510.3-3(c)(1). The application by the Sixth Circuit of 29 C.F.R. § 2510.3-3(c)(1) to who may be a

"participant" under ERISA is misplaced and not supported by case law from nine other circuits.

Section 2510.3-3 is entitled "employee benefit plan" and serves only to "clarify the definition in section 3(3) of the term 'employee benefit plan' for purposes of Title I of the Act and this chapter." (Petition App. 53a). Section (b) of this regulation defines "plans without employees" and provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . . ." *Id.* Section (c) sets forth the definition of "employee" for purposes of determining whether the employee benefit plan is benefiting employees. An individual or his or her spouse are deemed not to be "employees" of an employer that is wholly owned by the individual or by the individual and his or her spouse for the purpose of determining if an "employee benefit plan" exists. *Id.* Therefore, if the only participants of an employee benefit plan are the owner and his or her spouse, the plan does not meet the definition of an "employee benefit plan" under ERISA. However, if the employee benefit plan benefits employees other than the sole owner (and his or her spouse), the plan meets the definition of "employee benefit plan," and all the participants in the plan, including the sole owner, are entitled to the protections of ERISA, including those contained in the anti-alienation provisions. (Petition App. 53a-55a). Section 2510.3-3 is not determinative of whether an individual is an "employee" or a "participant" in an employee benefit plan. *Darden*, 503 U.S. 318 (1992).[9]

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[9] The holding of this Court in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673 (2003) is not applicable to this case. In *Clackamas*, this court endorsed the Equal Employment Opportunity Commission's guidelines for determining whether partners and

The *Fugarino* court found an ERISA employee benefit plan to exist and interpreted 29 C.F.R. § 2510.3-3(c)(1) to mean that a plan whose sole beneficiaries are the company's owners cannot qualify as an employee benefit plan under ERISA. *Fugarino*, 969 F.2d at 185-86. Taken by itself, this is a correct interpretation of this regulation as to plans whose only participant is the sole owner of the business or spouses who jointly own the business. *Fugarino* stretched this interpretation to apply to a group health plan that covered not only the sole owner and his wife and son, but also other non-related employees of the business.[10] *Id.* at 186. Based on this erroneous application, the court held that the

shareholders are employees under the Americans with Disabilities Act of 1990 ("ADA"). *Id.* at 1680 (citing 2 Equal Employment Opportunity Commission, Compliance Manual § 605:0009). The definition of "employee" within the ADA has two purposes. The first purpose is to determine whether there are enough "employees" to meet the fifteen employee threshold thereby subjecting the employer to the rules and regulations under the ADA. Secondly, the same definition is used to determine whether an individual is an "employee" entitled to sue for protections under the ADA. There must be an "employee benefit plan" and an "employer" for ERISA to apply. DOL Regulation 29 C.F.R. § 2510.3-3 specifically provides a test to determine whether an "employee benefit plan" exists. After it is established that an "employee benefit plan" exists, the determination of who may participate in the "employee benefit plan" is based on the definition of "employee" in 29 U.S.C. § 1002(6) and the definition of "participant" in 29 U.S.C. § 1002(7). Furthermore, as argued *infra*, statutory provisions of ERISA and the Internal Revenue Code evidence a clear Congressional intent to allow shareholder-employees to participate in employee benefit plans.

[10] The court based its holding in part on the proposition that a sole proprietor or sole shareholder "must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Fugarino*, 969 F.2d at 186. However the Sixth Circuit had previously held that shareholder status, without more, was not enough to confer ERISA employer status. *Scarbrough v. Perez*, 870 F.2d 1079 (6th Cir. 1989); *see also Santino v. Provident Life and Accident Ins. Co.*, 276 F.3d 772, 775 (6th Cir. 2001).

group health plan was an ERISA plan only as to the non-owner employees and, at the same time, was an insurance contract governed by state law as to the owner, his wife and his son. *Id.* The result was one group health plan subject to both ERISA and state law.

Eight years later the *Agrawal* court cited *Fugarino* for the proposition that a *sole proprietor* could not be a participant in an ERISA employee benefit plan and applied this reasoning in holding that a *sole shareholder* also could not be a participant or a beneficiary under an ERISA employee benefit plan. *Agrawal*, 205 F.3d at 300, 302. At issue in *Agrawal* was whether a sole shareholder's state law claims to enforce the provisions of an individual disability policy were preempted by ERISA. The corporation purchased an individual disability policy for the sole shareholder along with a separate group disability policy covering employees of the corporation. *Id.* at 298-99. The defendant insurance company argued that these plans taken together jointly constituted an ERISA employee benefit plan. *Id.* at 299. The court determined that it did not need to decide this issue because, under the holding of *Fugarino*, the sole shareholder could not be a participant or beneficiary of an ERISA employee benefit plan. *Id.* at 302. Therefore, Agrawal had no standing to enforce his rights under ERISA, and his state law claims arising under the ERISA plan were not preempted. *Id.* While stating that this result was "preordained" by the decision in *Fugarino*, the court also stated that the reasoning in *Fugarino* was "not thoroughly consistent with the goals of ERISA." *Id.* Applying the definition of "employee" contained in 29 C.F.R. § 2510.3-3(c)(1) to exclude self-employed individuals from the statutory definition of participant and beneficiary bestowed on self-employed individuals a "unique advantage: the self-employed individual can pursue a parade of state law

claims that are withheld from his employees by preemption," a result clearly inconsistent with the purposes of ERISA. *Id.* at 303.

The Sixth Circuit's misinterpretation of 29 C.F.R. § 2510.3-3(c)(1) continued in *Santino v. Provident Life and Accident Ins. Co.*, 276 F.3d 772 (6th Cir. 2001). In *Santino*, the court utilized the *Darden* test to determine that a joint shareholder of a corporation was an "employee" for purposes of ERISA. The shareholder argued that 29 C.F.R. § 2510.3-3(c)(1) prevented him from being an employee because he owned part of the corporation. In response, the court deferred to the DOL's interpretation of this regulation in DOL Opinion Letter 76-67A, May 21, 1976, under this Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court stated "[m]oreover, the Department of Labor interprets section 2510.3-3(c)(1) as applying '**only** where the stock of the corporation is wholly owned by one shareholder.'" *Santino*, 276 F.3d at 775 (citing DOL Opinion Letter 76-67A, May 21, 1976) (emphasis in original). However, the court omitted a pertinent portion of the DOL's finding contained in the same sentence cited by the court. In fact, the DOL found that this regulation excludes a pension or profit sharing plan from ERISA where the sponsoring corporation is "wholly owned by one shareholder and his or her spouse *and the shareholder or the shareholder and his or her spouse are the only participants in the plan.*"[11] DOL Opinion Letter 76-67A, May 21, 1976 (emphasis added). Applying the entire interpretation found in DOL Opinion Letter 76-67A, May

[11] It is interesting to note that four months later the Sixth Circuit in *Yates* completely ignored not only the DOL opinion letter cited in *Santino* but also two other DOL opinion letters interpreting 29 C.F.R. §2510.3-3(c)(1). *See* DOL Opinion Letter 79-08A, January 30, 1979; DOL Opinion Letter 99-04A, February 4, 1999.

21, 1976, to the facts of *Yates* supports a finding that Yates can be an employee of Yates, P.C. and a participant in the Profit Sharing Plan.

The *Santino* court further held that because the holding in *Fugarino* should be limited to sole proprietors and sole shareholders, a joint shareholder is not precluded from being a participant in an ERISA employee benefit plan. *Santino*, 276 F.3d at 776. As support for this holding, the court cited *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) for the proposition that excluding shareholders from participation in employee benefit plans would frustrate Congress' intent to ensure similar treatment for all claims relating to such plans. *Id.* However, the Fourth Circuit in *Madonia* held that a *sole* shareholder could be an employee and consequently a participant in an employee benefit plan in which other non-owner employees participated, which is contrary to holding in *Yates*. *Madonia*, 11 F.3d at 450.

B. The Sixth Circuit Decision in *Yates* Is in Conflict with Case Law in Nine Other Circuits.

The reasoning of the Sixth Circuit in *Fugarino*, *Agrawal*, and *Yates* is inconsistent with decisions rendered by the courts of appeals in nine other circuits. The circuit courts in the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have interpreted 29 C.F.R. § 2510.3-3(c)(1) to apply *only* to the determination of whether an "employee benefit plan" exists, not to the question of whether an individual can be a "participant" in an employee benefit plan. These circuits have interpreted this regulation to mean that an employee benefit plan exists if the plan benefits "employees" other than the sole owner of the

corporation, a partner or a sole proprietor. *Schwartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985) (holding that a self-employed physician who was the only participant in a Keogh plan was not a participant for purposes of ERISA); *Leckey v. Stefano*, 263 F.3d 267 (3d Cir. 2001) (ruling that one of three shareholders of a corporation was an employee of the corporation for purposes of 29 C.F.R. § 2510.3-3 because the corporation was not wholly owned by the individual or the individual and his spouse); *Wolk v. UNUM Life Ins. Co. of Am.*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) (deciding that a partner of a law firm was a beneficiary of a long-term disability plan covering other partners and employees of the firm); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) (holding that a sole shareholder of a corporation was an employee of the corporation and a participant in a health plan that also covered other employees of the corporation); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999) (providing that a husband/co-owner of a corporation was an employee of the corporation and a participant in a health plan covering non-owner employees); *In re Baker*, 114 F.3d 636 (7th Cir. 1997) (stating that a majority shareholder of a corporation was an employee of the corporation and a participant in a profit sharing plan in which 18 other employees participated); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (ruling that a husband and wife who were sole owners of a corporation were at least beneficiaries of a group health plan also covering one other full-time employee of the corporation); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001) (deciding that a husband and wife who were sole shareholders of a corporation were not participants in a long-term disability policy only covering themselves; the policy was not an employee benefit plan under ERISA); *Watson v. Proctor*

(In re Watson), 161 F.3d 593 (9th Cir. 1998) (determining that a sole shareholder of a corporation was not an employee of the corporation or a participant in a profit sharing plan in which he was the sole participant; therefore, the plan was not an employee benefit plan under ERISA); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995) (ruling that a partner was a beneficiary of a group health policy covering the other partner and one employee of the partnership); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001) (holding that a 49% shareholder of a corporation was an employee of the corporation and a participant in an individual disability policy; the policy was an employee benefit plan under ERISA because he was not a "sole" shareholder); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001) (stating that the sole shareholder of a corporation was a beneficiary of the group health plan that covered him, his wife and three other employees); and *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999) (holding that the sole shareholder of a professional corporation was not a participant in a disability policy that covered only him).

The First Circuit is the only circuit to join the Sixth Circuit in its reasoning regarding the application of 29 C.F.R. § 2510.3-3.[12] In *Kwatcher v. Mass. Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989),

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[12] The Seventh Circuit in *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1998) stated that 29 CFR § 2510.3-3(c)(1) excludes sole owners from the definition of employee and consequently a sole proprietor did not have standing to sue under ERISA as a plan participant. However, the Seventh Circuit later limited *Giardono* to cases involving sole proprietors and stated that 29 CFR § 2510.3-3 "means only that a one-person corporation must use a Keogh plan rather than an ERISA plan for its solitary employee; a firm with multiple employees may establish an ERISA pension or welfare plan in which the investor may participate." *In re Baker*, 114 F.3d at 639.

the court held that a sole shareholder of a corporation fell within the definition of an "employer" for purposes of ERISA and could not be a participant in an ERISA pension plan. This holding was based, in part, on the Fourth Circuit's holding in *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (4th Cir. 1986) that, in an ERISA case, the common-law test regarding a master-servant relationship is inappropriate when construing the definition of "employee" under ERISA. *Id.* at 706. This holding was subsequently overruled by this Court in *Darden*, 503 U.S. 318 (1992).[13]

C. The Sixth Circuit Decision in *Yates* Ignores This Court's Holding in *Darden*.

The issue of whether Yates is an employee under ERISA and a participant entitled to enforce the spendthrift clause contained in the Profit Sharing Plan must be resolved using this Court's reasoning contained in *Darden*. In *Darden*, this Court adopted a common-law test for determining who is an "employee" under 29 U.S.C. § 1002(6) of ERISA. *Darden*, 503 U.S. at 319. The definition of "employee" is important because this term is used to determine who can be a "participant" as defined in 29 U.S.C. § 1002(7) of ERISA. (Petition App. 61a-62a). This Court held in *Darden* that the common-law definition of employee should be used to determine who could be an employee and therefore a participant in an employee benefit plan. *Darden*, 503 U.S. at 323. The Sixth Circuit in *Fugarino* and *Agrawal* ignored the *Darden* reasoning and instead erroneously applied the limited definition of "employee" found in 29 C.F.R. § 2510.3-3(c)(1), which should be used solely to determine if an employee benefit plan exists. This error was

[13] The *Fugarino* court also relied on *Kwatcher* in holding that a sole proprietor or sole shareholder cannot be considered an employee for purposes of ERISA. *Fugarino*, 969 F.2d at 186.

perpetuated by the Sixth Circuit decision in *Yates*, resulting in the decision before this Court for review.

D. The Sixth Circuit Decision in *Yates* Ignores the DOL's Interpretation of 29 C.F.R. § 2510.3-3.

In misapplying the provisions of 29 C.F.R. § 2501.3-3(c)(1) to Yates, the Sixth Circuit ignored not only the plain reading of the regulation but also the interpretation of this regulation by the agency which promulgated it. The DOL has issued advisory opinions addressing the issue of whether "working owners," either sole proprietors, partners or shareholders, who provide personal services to their business can be "participants" in an employee benefit plan sponsored by a company. The DOL concluded that working owners are not precluded from being participants under ERISA in employee benefit plans in which other non-owner employees participate. DOL Opinion Letter 79-08A, Jan. 30, 1979; DOL Opinion Letter 99-04A, Feb. 4, 1999. These opinions are entitled to deference.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable

> interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-844.

Despite the fact that these opinion letters were cited by Yates and the Profit Sharing Plan in their brief, the Sixth Circuit opinion in *Yates* makes no reference to these opinion letters which directly addressed the issue that was before the court.

E. The Sixth Circuit Decision in *Yates* Conflicts with the Purposes of ERISA and Leads to the "Absurd Results" This Court Warned Against in *Darden*.

The decisions by the Sixth Circuit in *Fugarino*, *Agrawal*, and *Yates* produce the "absurd results" this Court warned about in *Darden*. By finding that a sole shareholder of a corporation cannot be both an employer and an employee (in blatant disregard of state common law recognizing these separate and distinct legal identities) and is ineligible to qualify as a participant with the full rights and benefits afforded by ERISA, the Sixth Circuit in essence has created two types of plan participants – ERISA participants (the non-owner employees) and non-ERISA participants (owner employees). Based on the Sixth Circuit's holdings, a "sole shareholder" can resort to more extensive state law remedies to enforce his or her rights under the same plan while participants are limited to ERISA's remedial scheme. Such a result is most certainly "absurd" in light of the purposes of ERISA and Congress' intent to formulate a nationwide standard of law to govern ERISA plans and their participants. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Madonia*, 11 F.3d at 450. For example, if the participants wish to pursue a claim

of breach of fiduciary duty against a plan fiduciary, the employee/participants are limited to the enforcement provisions found in Title I of ERISA, including "appropriate equitable remedies" as interpreted by this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). On the other hand, a sole shareholder could resort to state law remedies for the same breach of fiduciary duty, including the possibility of money damages, treble damages and punitive damages (available under some consumer protection statutes) that are not available to the employee/participants in the same plan. The Sixth Circuit's holdings in *Fugarino*, *Agrawal* and *Yates* serve to divide ERISA benefit plans into two components: one governed by ERISA as to employees and one governed by state law as to sole shareholders such as Yates. Such a result is absurd and is inconsistent with case law in at least six other circuits.[11]

Furthermore, such inconsistent remedies fly in the face of the ERISA preemption statute contained in 29 U.S.C. § 1144, which provides that the provisions of

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[11] The courts in the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have held that where an employee benefit plan covers employees other than a sole owner or the sole owner and his or her spouse, the sole owner can be a participant; and such a plan is covered under ERISA. These courts specifically noted the importance of ensuring consistent remedies for all participants and furthering Congress' intention of a nationwide body of uniform law as support for their holdings. *See Wolk v. UNUM Life Ins. Co. of Am.*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995); *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999), and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001).

Title I and Title IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]." 29 U.S.C. § 1144(a). This Court has characterized this preemption language as "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The ERISA preemption statute has also been described as "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). The Sixth Circuit held that Yates was not a participant of the Profit Sharing Plan and that he could not avail himself of the protections of ERISA. It is interesting to note that the Sixth Circuit in *Yates* did not hold that the Profit Sharing Plan was not an employee benefit plan as to other employee participants. It is inconsistent for the Sixth Circuit to hold that Yates is a non-ERISA entity which may pursue state law claims in regard to an employee benefit plan given ERISA's preemption provision that any and all state laws that relate to an employee benefit plan are preempted.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit Court of Appeals holding that Yates is not an employee in the Profit Sharing Plan, should overturn the grant of summary judgment in the favor of the Bankruptcy Trustee and grant summary judgment in the favor of Yates and the Profit Sharing Plan based on the fact that Yates is an employee of Yates, P.C. and a participant in the Profit Sharing Plan and is entitled to enforce the Profit Sharing Plan's anti-alienation provisions as outlined in *Patterson*.

Respectfully submitted this 11th day of August, 2003.

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No. 02-458

IN THE

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C., Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON, Trustee,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

The issue before the Court in this case is whether the sole shareholder of a corporation, a Debtor in bankruptcy, should be classified as an "employer" or an "employee" as those terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA").

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STATUTORY PROVISIONS INVOLVED

This issue before the Court in this case relates to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (2003), (hereinafter "ERISA"). Specifically, this case relates to the definition of an "employer," of an "employee," and of a "participant" as contained in 29 U.S.C. §§ 1002(5), (6), and (7).

STATEMENT OF THE CASE

This appeal emanates from an involuntary bankruptcy case filed against Raymond B. Yates under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*) The facts of this appeal are largely undisputed.

The undisputed facts show that the individual debtor in bankruptcy, Raymond B. Yates, was the sole shareholder of Raymond B. Yates, M.D., P.C. (Joint Appendix, hereinafter "JA," 1a-3a)[1] . By agreement dated July 20, 1989, Raymond B. Yates, M.D., P.C., adopted a Profit Sharing Plan named the "Raymond B. Yates, M.D., P.C., Profit Sharing Plan."[2] (*Ibid.*). At times material hereto, the Debtor and three other participants participated in the Plan. (JA 269a).

On December 13, 1989, the Debtor received a loan from the Plan. (JA 267a-269a). Also on that date, the Debtor executed a promissory note payable to Plan evidencing the

1. The individual debtor, Raymond B. Yates, will be referred to hereafter as "the Debtor" when referred to in his individual capacity as the debtor in bankruptcy.

2. The Raymond B. Yates, M.D., P.C. Profit Sharing Plan will be referred to hereinafter as "the Plan."

loan. (JA 259a). The note specified the amount of the loan and the interest rate accruing upon the unpaid balance but provided for no periodic payments. (*Id.*). Although the initial term of the loan was for a period of five years, the note was purportedly extended for another period of five years. (JA 269a).

The loan in and of itself violated the terms of the adopted plan in several ways. First, the Plan terms prohibited any loans to "Shareholder-employees" or "Owner-employees." (JA 207a). Secondly, the Plan required all loans to be repaid by payroll deductions made at least quarterly. (JA 67a). Thirdly, the Plan prohibited loan repayment periods of longer than five years unless the loan was for the purchase of a principal residence. (*Id).* And finally, there are no facts in the record indicating that the procedures outlined in the Plan (at pages JA 68a-69a) were followed.

This loan was not repaid until November 1996, in the total amount of $50,467.46, upon the sale of certain real property owned by the Debtor. (JA26a-28a). Other than another lump sum payment from an inheritance, no other payments on this loan had been made by the Debtor contrary to the terms of the adopted plan. (*Id.*) The repayment of the $50,467.46 at issue herein came at a time when the debtor was involved in extensive litigation with one of his creditors, wherein the creditor was seeking to recover on its loans to the Debtor. (JA 25a). In fact, on December 2, 1996, and within weeks of the repayment of the loan by the Debtor to the pension plan, an involuntary bankruptcy petition under Title 11 of the United States Code was filed by the litigating creditor against the Debtor. (JA 31a).

On August 5, 1998, the Respondent, William T. Hendon, Chapter 7 Trustee in the bankruptcy case, filed an adversary proceeding against the Plan and the Plan's Trustee. (JA 1a-3a). The Bankruptcy Trustee alleged that the repayment by the debtor of the sum of $50,467.46 to the Plan was an avoidable transfer and sought recovery from the Plan pursuant to 11 U.S.C. §§ 547 and 550. (*Id.*).

On October 3, 1998, the Plan and the trustee of the Plan filed their answer to the Respondent's Complaint. (JA 4a). In their Answer, these Petitioners admitted that in November of 1996, and within 90 days of the filing of the Involuntary Petition against the Debtor, the Debtor repaid the sum of $50,467.46 to the Plan in repayment of loans the Debtor had received from the Plan. (*Id.*). The Petitioner Plan alleged that the Plan assets were exempt by law and that a return of the funds would be violation of the disbursement provisions of the Plan. (JA 6a).

On March 31, 1999, each party filed a Motion for Summary Judgment with supporting documents and memorandum. (Petitioners' Petition for Writ of Certiorari, hereinafter "Petition" at page 36a). On September 2, 1999, the Bankruptcy Court filed its Memorandum on Cross Motions for Summary Judgment granting the Respondent's Motion for Summary Judgment and denying the Petitioner's Motion for Summary Judgment. (*Id.*). Specifically, the Bankruptcy Court ruled that the Respondent had established all of the elements required by 11 U.S.C. § 547 concerning the avoidability of a preferential transfer. (Petition 41a-42a). The Bankruptcy Court further held that individual Debtor's interest in the Plan was not in a qualified ERISA plan and that the provisions of ERISA did not bar the Trustee from recovering the preferential transfer made by the Debtor to the Plan. (Petition 43a-44a).

On June 26, 2000, the District Court affirmed the decision of the Bankruptcy Court that the Debtor's interest in the Plan was not protected by the provisions of ERISA. (Petition 9a). In addition, the District Court affirmed the Bankruptcy Court as to the remaining issues before it affirming the Bankruptcy Court's granting of summary judgment in favor of the Respondent. (*Id.*).

On April 19, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the lower courts. (*Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), *cert. granted*, 2003 U.S. LEXIS 5033 (U.S. June 27, 2003)).

On June 27, 2003, this Court granted the Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Respondent respectfully submits that the lower courts correctly ruled that the individual Debtor may not be a "participant" as defined by ERISA. Consequently, the individual Debtor's interest in the Plan is not protected by ERISA's anti-alienation provisions. Thus, there is no bar under ERISA to the Respondent's claim to avoid and recover the preferential transfer.

This case presents to this Court the issue of interpreting the terms "employer" and "employee" as defined by ERISA and as applied to the facts of this case. When these definitions are examined in light of the policies behind the enactment of ERISA, it is apparent that sole shareholders of corporations are characterized as employers under ERISA, and thus excluded from the protective provisions thereof.

The Respondent also submits that if the construction of ERISA espoused by the Petitioner is accepted, the policies behind the enactment of ERISA will be placed in conflict. Such conflict is avoided by the holdings of the lower courts and by classifying the Debtor in this case as the "employer" as defined by ERISA.

Finally, the Respondent submits that the decisions of the lower courts do not conflict with the decision of this Court in *Darden* and nine other circuit courts of appeals. And when the approaches of circuit courts are considered, the approach employed by the Sixth Circuit ultimately is the only approach that fosters all of the policies and goals of ERISA.

ARGUMENT

Throughout these proceedings and as their defense to this preference action, Petitioners have asserted that the individual Debtor's interest in this pension plan is excluded from the bankruptcy estate. Petitioners assert that the Debtor's interest is in an ERISA qualified plan. In their Brief before this Court, Petitioners again mischaracterize this case by asserting that the Respondent, the Bankruptcy Trustee, "in this case is attempting to alienate" the Debtor's interest in the Plan. (Petitioners' Brief at page 6). Such is incorrect. The Respondent is seeking to recover a preference from the Plan and its Trustee under the preference provisions of the Bankruptcy Code, 11 U.S.C. § 547. The individual Debtor is not named as such in these proceedings and this action is not an attempt by a creditor to alienate the Debtor's interest in the Plan. Decisions of this Court in *Patterson v. Shumate*, 504 U.S. 753 (1992) and in other cases construing whether such interests are excluded from a bankruptcy estate under Section 541 of the Bankruptcy Code simply have no

application to the case *sub judice*. However, the Respondent respectfully submits that even if the status of the Debtor's interest is considered, the lower courts correctly held that the Debtor cannot be a participant under the terms of ERISA.

A. Yates Is An "Employer" And May Not Be A "Participant" Under ERISA.

In enacting ERISA, Congress found:

> that the continued well-being and security of millions of employees and their beneficiaries are directly affected by these plans;
>
> . . . .
>
> that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans;
>
> . . . .
>
> and that it is therefore desirable in the interest of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a).

Based upon these findings, Congress declared the policy of ERISA to be to

> protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

29 U.S.C. § 1001(b).

Notwithstanding these findings, ERISA provides only a limited definition of an employer and employee. 11 U.S.C. § 1002, provides, in pertinent part as follows:

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.
>
> (6) The term "employee" means any individual employed by an employer.

ERISA also distinguishes between a "participant" and a "beneficiary." Subsection (7) of Section 1002 provides: "The term 'participant' means any *employee*, or former *employee* of an employer, ... who is or may become eligible

to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . ." (Emphasis added). "Beneficiary" is defined in Subsection (8) as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit hereunder." Therefore, Congress limited the definition of a participant to an employee of an employer but did not so limit the definition of a beneficiary.

At issue in this case is the status of the Debtor as employee or employer, as sole shareholder of the corporation. As stated by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998), "the plain language of ERISA is ambiguous with respect to the classification of a 'dual status' employer/employee." Further, this Court has expressly stated that ERISA's definition of "employee" is "completely circular and explains nothing." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

The legislative history of ERISA provides little insight into the definitions of "employer" and "employee" but may contain some indications that are pertinent to this case. Concerning the definition of "employee" the legislative history indicates that Congress intended the definition to include persons who have the "status of an employee under a collective bargaining agreement." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4639, 4648. Under conventional labor-law principals, management would be excluded under the definition of "employee." *Kwathcher v. Massachusetts Service Emp. Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

This Court in the *Darden* case addressed the ERISA's definition of an "employee." In *Darden*, this Court was called upon to determine whether an independent contractor was an "employee" under ERISA. In that case, this Court adopted a two step approach in construing ERISA's definition of "employee." First, the Court looked to other provisions of ERISA for guidance in defining the term. *Id.* at 323. Because the Court found no assistance in other provisions in ERISA to distinguish between an independent contractor and an employee, the Court adopted a common law test. *Id.*

The Petitioner and the United States (as *amicus curiae*) both focus on ERISA's definition of "employee" and virtually ignore ERISA's definition of "employer." While the initial portions of the definition of an "employer" appear to be as circular as the definition of an "employee," additional language is included within that definition that is pertinent to this case. Within the definition of "employer," Congress included other persons acting "indirectly in the interest of an employer." 29 U.S.C. § 1002(5). This additional language expands ERISA's concept of an "employer" beyond common law or corporate law notions. *Kwathcher*, at 960.

Applying the facts of this case to the foregoing supports the lower courts' classification of the individual Debtor as "employer" and excluding him from the definition of "participant." The individual Debtor herein was the sole shareholder of the corporation. (JA 15a). The corporation at issue was not a Sub-Chapter S corporation. (JA 35a-36a). Upon the establishment of the plan, the individual Debtor was expressly designated as the Trustee of the plan. (JA 36a). Further, the "Plan Administrator" was designated as "The Employer, ATTN: RAYMOND B. YATES." (*Id.*). A loan was made to himself which was clearly prohibited in the first

place and non conforming in its terms even if initially authorized. (JA 207a and 67a-69a). The individual Debtor made investment decisions and directed the use of the plan's assets, which directions and decisions ultimately lead to losses of in excess of $248,000. (JA 315a, Affidavit of Dale Horst, a copy of which is attached hereto as an Appendix). Clearly, the individual Debtor controlled the operations of the plan and was acting directly in the capacity as an "employer, or indirectly in the interest of an employer, in relation to an employee benefit plan," within ERISA's definition of "employer." (11 U.S.C. § 1002(5)). There is simply no proof in the record as to the individual Debtor's status as employee other than an unspecified reference to "wages" (JA 9a). Under the facts of this case, the only logical conclusion is that the Debtor was acting as employer.

Contrary to the arguments made on behalf of the Petitioner and *amicus curiae*, other provisions of ERISA and the Internal Revenue Code do not provide guidance as to distinguishing between an "employer" and an "employee." For example, 29 U.S.C. § 1301(b)(1) by its plain language does not reference sole shareholders of corporations. Likewise, the Internal Revenue Code provides no assistance. By including certain shareholders within the definitions of an employee under the provisions of the Internal Revenue Code (26 U.S.C. §§ 401(c)(1), 414(q)(1)(a) and 416(1)(i)(B)(i)), Congress clearly intended to offer favorable tax treatment to such shareholders who contribute to employee benefit plans. However, by excluding such shareholders from the ERISA definitions of an "employee" and thus "participant," Congress intended to further the stated purposes of ERISA of guarding against an employer's exploitation, abuse or looting of funds collected for employee benefits plans. The differing definitions between ERISA and the Internal Revenue Code reveal that Congress may have simply intended to exclude sole shareholders from favorable protective

provision of ERISA such as the anti-alienation provisions while at the same time offering favorable tax treatment if they contributed to an employee benefit plan.

If other parts of the statutory or regulatory scheme of ERISA are to be considered, no clearer guidance as to the Debtor's status can be found than from the regulations contained in 29 C.F.R. § 2510-3.3(c)(1). That provision provides in pertinent part:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, . . .

Clearly, under this plain language, the Debtor herein, as sole shareholder, could not be considered an employee. Without regard to whether this provision is to be employed beyond the initial examination as to whether the plan itself is an ERISA qualified plan, this language is clear and provides guidance in the classification of the Debtor as employer.

Accordingly, under the facts of this case, the individual Debtor is properly classified as an "employer" instead of an "employee." The individual Debtor may thus not be a "participant" under an ERISA plan. The lower court's decision in that regard is correct and should be affirmed.

B. When The Policies Behind The Enactment Of ERISA Are Considered, The Individual Debtor Must Be Classified As An Employer.

The arguments of the parties to these proceedings illustrate potentially competing polices behind the enactment of ERISA; namely, Congress' desire to prohibit employer abuse and its desire to provide for a "single set of regulation." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). While treating a sole shareholder as an "employee" and thereby entitling the shareholder to the protections of ERISA for a "participant" may lead to uniformity of regulations relative to employee benefit plans, such treatment could inhibit the other purpose of prohibiting employer abuse.

Again as stated by the Court in *Watson*:

> ERISA Title I was adopted by Congress in 1974, in part, to remedy abuses by employers who manage pension plans assets held in trust for workers in traditional employer-employee relationships. Congress recognized that workers, i.e., traditional "employees" are vulnerable to abuse by employers because employers typically maintain exclusive control over the pension funds of their employees. In contrast, a self-employed individual such as Watson, has complete control over the amount, investment and form of the fund because he voluntarily creates and manages it for his own retirement. Congress had no reason to extend ERISA coverage to self-employed owners such as Watson. Self interests provides adequate protection. Therefore, it was reasonable for the

> Department of Labor to exclude self-employed sole shareholders from its definition of "employees" for purposes of ERISA.

Watson, at 598.

Examples of such possibilities for abuse are actually present in the case at hand. Clearly, the Debtor's actions in total disregard of the limitations contained in the plan regarding loans evidence the kinds of potential self dealing abuses discussed above. The individual Debtor's control over the funds is evidenced by his directed use of the funds resulting in losses of over $248,000. The Debtor should not be permitted to act in disregard his fiduciary obligations under ERISA and the clear limitations contained in his purported plan, treat the funds as his own for years without the requirement of making loan payments in violation of the plan, and then after the commencement of a bankruptcy case assert that he was subject to the restrictions of an ERISA qualified plan which he had previously patently ignored.

In short, actual abuse is present in the case at hand. Competing with the Congressional policy of prohibiting such abuse is the argument that by excluding shareholder owners from the definition of "participant," inconsistent state law remedies, albeit unspecified, may be available to such shareholders which would frustrate the desire for uniform regulations. On the other hand, if shareholder owners are classified as "participants", not only do benefits inure to them contrary to 29 U.S.C. § 1103(c), but they would enjoy the protective shields of the anti-alienation provision as to their interests while having complete control over the plan funds. Such employers could act in complete disregard of ERISA and plan restrictions (as the Debtor did here), and other

injured employees would have no remedies against them in instances like the present case where the employer files bankruptcy and has no other assets available for creditors. In instances like the present case, liability for breach of fiduciary obligations would be meaningless yet the only viable assets remaining for creditors would be excluded from their reach even if the assets were wrongly converted or misappropriated.

While the possibility of different regulations should be subordinate to the policy of protecting the assets of benefit plans, it is nevertheless possible to avoid these conflicts through the definition of "beneficiary." On the contrary, adopting the argument espoused on behalf of the Petitioner results in the policy of preventing abuse being subordinated to a policy of having uniform regulations.

This term "beneficiary" is plainly defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitle to a benefit thereunder." 29 U.S.C. § 1002(8). Since ERISA's civil enforcement provisions in § 502(a)(1)(B) are available for a "participant" and a "beneficiary," uniformity of regulations can achieved by including an "employer" within the broad definition of "beneficiary." However, such may be for another case as the definition of "beneficiary" is not at issue herein.

Therefore, considering the policies behind the enactment of ERISA, under the facts of this case the individual Debtor as sole shareholder should be classified as an "employer." If a bright line rule is to be established as to sole shareholders, classifying them as employers is the only result that can further all of the policies and goals of ERISA.

C. The Holding Of The Sixth Circuit In *Yates* Does Not Conflict With This Court's Opinion In *Darden*.

Petitioners also argue that the Sixth Circuit's decision in this case and in the *Fugarino* case are inconsistent with this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

In *Darden*, the sole issue was whether the claimant was an "employee" or an "independent contractor" as defined under ERISA. In making this determination, the Supreme Court noted that the term "employee" was not specifically defined in ERISA and that courts should look to traditional common law criteria of agency, such as control, in making this determination. *Id.* at 323.

As stated above, this case presents the issue as to whether the Debtor is an employer or employee under ERISA. Common law criteria of control make no sense if applied in this instance.

This employer/employee conflict and the application of *Darden* in resolving the definition, was addressed by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593 (9th Cir. 1998), a case cited by the Petitioners. In that case, the court was reviewing the bankrupt's claim to exempt his interest in his pension plan and the bankrupt's status as an employer or employee. The bankrupt was the sole shareholder of his medical corporation. In discussing the applicability of *Darden*, the court stated:

> In *Darden*, the Supreme Court addressed a different issue. Whereas here, the issue is one of

a "dual status" employer-employee, in *Darden*, the issue involved the distinction between "employees" and "independent contractors."... In deciding whether Darden could properly be considered Nationwide's "employee" for purposes of ERISA, the Court held that the term "employee" as it appears in ERISA, 29 U.S.C. § 1002(6), incorporates "traditional agency law criteria for identifying master-servant relationships.

> The traditional agency criteria can be applied logically only in situations involving relationships between two different persons, i.e., those who employ persons and those who are so employed. Accordingly, *Darden* instructs that we apply the traditional agency definition of "employee" when confronted with the question of whether a specific individual is, in relation to another, an employee or an independent contractor for purposes of ERISA. The issue we confront here is different. It is whether a self-employed owner is also his own "employee" for purposes of qualifying his Plan under ERISA. Traditional agency law criteria provide no answer. Thus, we cannot logically apply *Darden* in this case.

Id. at 597 (citations and emphasis omitted).

Likewise, *Darden*, cannot be logically applied to the Petitioners' assertion that although the individual Debtor is the sole owner of his professional corporation, he is nevertheless an employee under ERISA. As found by one court, ERISA contemplates that the "employer" and the "employee" are two separate persons and that the "twain shall never meet." *Kwatcher*, at 959. Accordingly, neither *Fugarino* nor *Yates* conflicts with this Court's decision in *Darden*.

D. The Yates Decision Is Not In Conflict With The Decisions Of "Nine Other Circuit Courts."

As a further basis in support of their argument that this Court should overrule the lower courts, Petitioners assert that the Sixth Circuit's decision conflicts with the decisions of "nine other circuit courts." However, a careful examination of these cases reveals that such is not the case.

As indicated above, the precise issue herein relates to the status of the bankrupt as employer or employee under ERISA. In construing the language of ERISA and the regulations, particularly 29 C.F.R. § 2510-3.3(c)(1)[3], the Sixth Circuit has held that sole owners or shareholders of employers may not be participants under an ERISA qualified plan. *Agrawal v. Paul Revere Life Insurance Co.*, 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992); and *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). Many of the decisions of the other circuits cited by the Petitioners as being in direct conflict with these decisions are readily distinguished on their facts.

---

3. 29 C.F.R. § 2510-3.3(c)(1) provides:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, . . .

For instance, some of the cases from the other circuits cited by the Petitioners deal with the issue of whether a particular claimant is a "beneficiary" under a group health benefit plan under ERISA. *See, e.g., Wolk v. Unum Life ins. of America*, 186 F.3d 352 (3d Cir. 1999); and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001). In each of these cases, the courts held that the claimants were entitled to benefits under the group health plan and were thus beneficiaries of the plan as defined by ERISA. *Wolk*, at 358. ERISA's definition of beneficiary is not as issue herein.

In other instances, the courts were focusing on combined plans or groups of plans. *See, e.g., Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); and *Laventure v. Prudential Ins. Co. of America*, 237 F.3d 1042 (9th Cir. 1998). In those cases, the courts held that a plan not qualifying as an ERISA plan was not converted into a qualifying ERISA plan by either later offering it to other employees or combining it with other qualified plans. *Slamen*, at 1106; and *Laventure*, at 1047.

Other cases deal with the question of whether minority shareholders are "employers" or whether other family members of an owner are "employers." *See, e.g., Leckey, v. Stefano*, 263 F.3d 267, 272 (3d Cir. 2001), (holding that a step daughter of an owner was not an "employer"). In *Simpa v. Mass. Cass. Ins. Co.*, 256 F.3d 1006, 1011 (10th Cir. 2001) and *In re Baker*, 114 F.3d 636, 639 (7th Cir. 1997), these courts held that owners of less than one hundred percent of the stock in the employer were not excluded from ERISA's definition of participant. In fact, the court in *Baker* expressly distinguished instances where the corporation was owned by a single individual, as is case *sub judice. Id.*

Finally, in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 597 (9th Cir. 1998), the court held that the sole shareholder of the corporation/employer was not an "employee" for purposes of ERISA. Although this case is cited by the Petitioners as being in conflict with the decisions of this circuit, *Watson* actually supports the decisions of the Sixth Circuit.

Respondent does concede that some decisions of other circuits appear to conflict with the decisions of the Sixth Circuit. *See, e.g., Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1999), and *Vega v. Nat. Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999). In these cases, the courts limit the provisions of 29 C.F.R. § 2510-3.3(c)(1) to initial determinations of whether a plan meets the definition of an "employee benefit plan" but apply these definitions no further, an approach espoused by the Petitioner. However, in cases such as this case where the person holds a dual status, such an approach may produce the conflicting result of the same person being an employer in one instance yet an employee in another. The decisions of the Sixth Circuit yield no such result. According, *Yates* should not be reversed and further proceedings herein are not necessary.

CONCLUSION

In conclusion, the Respondent submits that for the reasons cited herein, the decisions of the lower courts should be affirmed. However, the Respondent wishes to add that even if the decisions are reversed and that the interest of the Debtor is deemed to be that of a "participant" in an ERISA qualified plan, the inquiry in this case does not end. While not an issue presently before this Court, the issue would then become whether the bankruptcy trustee could nevertheless avoid the transfer and recover the proceeds of the transfer from the Plan since under 29 U.S.C. § 1144(d), ERISA does not supercede other federal laws like the Bankruptcy Code. Affirmation of the decision of the lower courts would pretermit this other issue.

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APPENDIX — AFFIDAVIT OF DALE HORST DATED NOVEMBER 23, 1999

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE

Case No. 96-34511
Chapter 7

Adversary Pro. No. 98-3088

IN RE:

RAYMOND B. YATES,

Debtor.

WILLIAM T. HENDON, TRUSTEE,

Plaintiff/Appellee,

vs.

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN and RAYMOND B. YATES, TRUSTEE,

Defendants/Appellants.

AFFIDAVIT OF DALE HORST

I, Dale Horst, hereby swear and affirm the following:

1. I am the President of ERISA Services, Inc.

2. ERISA Services, Inc. has been engaged by the Raymond B. Yates, M.D., P.C. Profit Sharing Plan ("Plan") to be the third party administrator of such Plan.

3. As part of our contractual arrangement, ERISA Services, Inc. provides accounting and compliance administration for the Raymond B. Yates, M.D., P.C. Profit Sharing Plan.

4. As of June 30, 1996, the total amount of assets in the Plan were $373,376.44.

5. Dr. Yates total account balance as of June 30, 1996 was $366,852.55.

6. Loraine Yates, Dr. Yates daughter's, account balance as of June 30, 1996 was $3,009.33.

7. Marshall West, an employee of Raymond B. Yates, M.D., P.C. who is not related to Dr. Yates', account balance as of June 30, 1996, was $411.74.

8. Marilyn Bacon, an employee of Raymond B. Yates, M.D., P.C. who is not related to Dr. Yates', account balance as of June 30, 1996 was $3,102,82.

9. On June 30, 1997, ERISA Services, Inc., based on the Plan's accounting procedures, wrote off $248,041.56 which included the original investment plus accrued interest from Dr. Yates' individual account because of an investment in Spectrum Consulting, Public Storage Properties & Professional Management, Inc. Dr. Yates directed that $210,000 be invested in Spectrum Consulting. Spectrum Consulting dissolved and is no longer a viable corporation. Public Storage's loss was $19,062. Professional Management, Inc.'s loss was $25,000. Dr. Yates' Plan lost its total investment in these businesses.

10. As of June 30, 1998, the total amount of Dr. Yates' individual account balance is $127,553.27.

FURTHER AFFIANT SAITH NOT.

s/ Dale Horst
Dale Horst, President
ERISA Services, Inc.

Supreme Court, U.S.
FILED
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(9)

No. 02-458

IN THE

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C., Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON, Trustee,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The Bankruptcy Trustee's Mischaracterization Of The Facts Does Not Show That Yates Is An Employer As Defined In ERISA.

The question presented in this case is whether a one hundred percent (100%) shareholder of a corporate employer, a partner or a sole proprietor can qualify as a "participant" in an "employee benefit plan" as those terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA") and thus be entitled to enforce the restriction against alienation contained in 29 U.S.C. § 1056(d) of ERISA and 26 U.S.C. § 401(a)(13) of the Internal Revenue Code. The Bankruptcy Trustee's Brief avoids the question presented in this case and attempts to confuse the issue presented by directing this Court's attention to whether Raymond B. Yates ("Yates"), in his individual capacity, is an "employer" for purposes of ERISA. First, such an exercise is irrelevant to the outcome of this case and there is no factual or legal basis for this argument. Second, even if one was to assume that Yates was an "employer" as alleged by the Bankruptcy Trustee, there is no provision in ERISA that prevents Yates from also being an "employee" and "participant" in an "employee benefit plan" as those terms are defined in ERISA. DOL Regulation 29 C.F.R. § 2510.3-3 provides that an employee benefit plan exists if at least one participant other than the sole owner of a corporation or sole proprietorship or a partner in a partnership participates in the plan. Therefore, 29 C.F.R. § 2510.3-3 contemplates that owner-employees may participate in an employee benefit plan as an employee of the entity.

The Bankruptcy Trustee alleges that Yates, in his individual capacity, is an employer and simply ignores that Raymond B. Yates, M.D., P.C. is a legal corporation that is the Plan Sponsor of the Profit Sharing Plan and the employer of Yates. The Bankruptcy Trustee's argument ignores fundamental principles of corporate law and, if adopted, would open the door for unlimited individual liability of corporate officers for actions taken on behalf of the corporation.

The Bankruptcy Trustee points out that Yates is the trustee of the Raymond B. Yates, M.D., P.C. Profit Sharing Plan ("Profit Sharing Plan") and as such "made investment decisions and directed the use of the plan's assets." (Brief of Respondent, page 10). The Bankruptcy Trustee further alleges that these actions are not consistent with Yates' status as an employee and that "[c]learly, the individual Debtor controlled the operations of the plan and was acting directly in the capacity as an 'employer, or indirectly in the interest of an employer in relation to an employee benefit plan,' within ERISA's definition of 'employer.' (11 [sic] U.S.C. § 1002(5))."[1] This simply is not true. Yates was acting as a **trustee** of the Profit Sharing Plan, not an employer when he was taking actions on behalf of the Profit Sharing Plan. The duties of the Profit Sharing Plan's trustee are described

1. The Bankruptcy Trustee states that Yates, in his individual capacity, was acting "indirectly in the interest of an employer." (Brief of Respondent, page 10). This argument is based on the definition of "employer" under ERISA § 3(5) [29 U.S.C. § 1002(5)]. The Department of Labor ("DOL") has addressed the phrase acting "indirectly in the interest of an employer" in several opinion letters. The DOL focuses on whether certain associations may be an "employer" for purposes of establishing an employee benefit plan. *Cf.* DOL Opinion Letter 90-19A. The phrase that the Bankruptcy Trustee relies on has not been used by the DOL to make a shareholder of a corporation the "employer" for purposes of ERISA.

in Article 16 of the plan document. (JA 231a-246a). These duties specifically include the investment of Profit Sharing Plan assets. *Id.* Therefore, Yates' actions in relation to the plan assets were in conformity with his duties as a plan trustee and do not foreclose the determination that Yates was an employee of Yates, P.C.

The Bankruptcy Trustee further attempts to confuse the issue presented in this case by emphasizing that the corporation, Raymond B. Yates, M.D., P.C. ("Yates, P.C."), is the Plan Administrator of the Profit Sharing Plan. (Brief of Respondent, page 9). Again, the fact that Yates, P.C. is the plan administrator has no impact on the question presented in this case of whether Yates individually may be an "employee" and therefore a "participant" in an "employee benefit plan." The fact that Yates, P.C. exercised its duties as provided in Article 15 of the Profit Sharing Plan (JA 222a-230a) does not dictate whether Yates, in his individual capacity, is an employer or impact the decision of whether Yates may be a participant in the Profit Sharing Plan.

In fact, ERISA § 403(c) [29 U.S.C. § 1103(c)] specifically provides that "[a]ny employee benefit plan may provide – (1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator; . . . ." *Id.* ERISA § 3(10) [29 U.S.C. § 1002(10)] defines the term "person" as an "individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." *Id.* Therefore, ERISA specifically allows for a corporation to be appointed as the trustee and plan administrator.

Further mischaracterizations by the Bankruptcy Trustee include the statement that "[a] loan was made to himself [Yates] which was clearly prohibited in the first place and non conforming in its terms even if initially authorized. (JA 207a and 67a-69a)." (Brief of Respondent, Pages 9-10). The evidence simply does not support this allegation. Article 12 of the Profit Sharing Plan governs the provision of loans. Section (g) of Article 12 provides

> (g) No loans will be made to any shareholder-employee or Owner-Employee. For purposes of this requirement, a shareholder-employee means an employee or officer of an electing small business (Subchapter S) corporation who owns (or is considered as owning within the meaning of Section 318(a)(1) of the Code), on any day during the taxable year of such corporation, more than five-percent of the outstanding stock of the corporation.

(JA 207a).

In order for the loan to Yates to be improper, Yates must have been either a shareholder-employee or Owner-Employee. The Bankruptcy Trustee states that "[t]he corporation [Yates, P.C.] at issue was not a Sub-Chapter S corporation." (Brief of Respondent, Page 9). Accordingly, there is no dispute that Yates is not a "shareholder-employee" as defined in Article 12(g) above. The definition of Owner-Employee is contained in Section 2.41 of the Profit Sharing Plan, which provides

> 2.41 "Owner-Employee" shall mean an individual who is a sole proprietor, or who is a partner

> owning more than ten (10) percent of the capital or profits interest of the partnership.

(JA 105a).

It is undisputed that Yates, P.C. is not a sole proprietorship or partnership. Yates, P.C. is a corporation. (JA 35a-36a). Accordingly, Yates is not an "Owner-Employee" as that term is defined by the Profit Sharing Plan. Therefore, the loan to Yates from the Profit Sharing Plan was not "clearly prohibited" as alleged by the Bankruptcy Trustee. In fact, the terms of the Profit Sharing Plan specifically allow for a loan to be made to Yates. (JA 66a-69a, 207a).

The Bankruptcy Trustee also relies on 29 U.S.C. § 1301(b)(1) as a basis for denying Yates' employee status. 29 U.S.C. § 1301(b)(1) is part of Title IV of ERISA governing defined benefit plans. The Profit Sharing Plan in this case is a defined contribution plan governed by Title I of ERISA. (JA 83a and 29 U.S.C. § 1002(34)). Reliance by the Bankruptcy Trustee on the provisions of Title IV of ERISA regarding the establishment of the Pension Benefit Guaranty Corporation and the definitional terms of that title have no bearing on this case.

II. The Bankruptcy Trustee's Argument That Yates Must Be An Employer In Order To Advance The Policies Behind ERISA Is Without Merit.

The Bankruptcy Trustee argues on page 12 of his Brief that Yates must be classified as an employer instead of an employee because failure to do so "could inhibit the other purpose [of ERISA] of prohibiting employer abuse." (Brief

of Respondent, page 12). This argument ignores that fact that even if Yates were classified as an employer and thereby denied participation in the Profit Sharing Plan, such classification would not prevent him individually from acting as a plan trustee or the corporation acting as the plan administrator. It is in these capacities that the potential for abuse exists, not in the capacity as a Profit Sharing Plan participant. The fiduciary duty standards contained in ERISA protect the Profit Sharing Plan and its participants from abuses by trustees and plan administrators. Therefore, the Bankruptcy Trustee's argument is without merit.

III. The Bankruptcy Trustee's Reliance On *Watson v. Proctor (In Re Watson)*, 161 F.3d 593 (9th Cir. 1998) Is Misplaced.

On pages 12 through 14 of his brief, the Bankruptcy Trustee relies on the case of *Watson v. Proctor (In Re Watson)*, 161 F.3d 593 (9th Cir. 1998) in support of his argument that Yates must be classified as an "employer" for purposes of ERISA. In fact, the Ninth Circuit's decision in *Watson* supports Yates' position in this case. In *Watson*, the Ninth Circuit held that the sole owner and the **sole** participant in a plan may not be an employee and participant in an employee benefit plan as defined in ERISA. This is consistent with a plain reading of 29 C.F.R. § 2510.3-3. This regulation provides

> (a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit

> plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.
>
> (b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.
>
> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. §§ 2510.3-3(a), (b) and (c).

It is clear from a plain reading of this regulation that Yates should not be excluded from being a participant in the Profit Sharing Plan because other non-owner employees participated in the Profit Sharing Plan. The regulation specifically states that where one or more common law employees participate in a plan in addition to the "self-employed individual," the plan is covered under Title I of ERISA.

IV. The Bankruptcy Trustee Is Seeking To Alienate Assets Of The Profit Sharing Plan In Contradiction Of This Court's Holding In *Patterson v. Shumate*, 504 U.S. 753 (1992).

The Bankruptcy Trustee denies that it is seeking to alienate assets of the Profit Sharing Plan but admits that he "is seeking to recover a preference from the Profit Sharing Plan and its Trustee under the preference provisions of the Bankruptcy Code, 11 U.S.C. § 547." (Brief of Respondent, Page 5). The Bankruptcy Trustee's assertion does not change the desired result of his action against the Profit Sharing Plan and its Trustee. The Bankruptcy Trustee is seeking to disgorge assets from the Profit Sharing Plan belonging to Yates, a participant in the Profit Sharing Plan. In response, Yates, in his capacity as trustee of the Profit Sharing Plan, is fulfilling his fiduciary duty to protect the interests of the Profit Sharing Plan. If the decisions of the lower courts stand, Yates' interest

in the Profit Sharing Plan will be alienated in contradiction of this Court's holding in *Patterson v. Shumate*, 504 U.S. 753 (1992). The decision of this Court in *Patterson* held that the anti-alienation provision of an ERISA-qualified plan, such as the Profit Sharing Plan in question in this case, is enforceable against the Chapter 7 Trustee to prevent plan assets from being alienated. Accordingly, the Bankruptcy Trustee cannot recover the avoidable transfers from the Profit Sharing Plan because to do so would amount to an alienation of plan assets. In *Patterson*, this Court held that "applicable nonbankruptcy law", for purposes of the Bankruptcy Code provision excluding from the debtor's estate interest in property subject to a restriction on transfer enforceable under applicable nonbankruptcy law, was not limited to state law, and specifically included ERISA and other federal law.[2]

This Court has also declined to recognize any exceptions to ERISA's anti-alienation provision *outside* the bankruptcy context. *Patterson*, *supra*, 504 U.S. 763 (citing *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990)). In *Guidry*, this Court held that a labor union could not impose a constructive trust on pension benefits of a union official who breached his fiduciary duties and embezzled funds from an ERISA-qualified plan. In *Patterson*, this Court determined that it would not recognize any exceptions to that provision *within* the bankruptcy context because to do so would create the possibility that creditors could engage in

2. It is interesting that the Bankruptcy Trustee concedes that the Internal Revenue Code includes shareholders within the definition of "employee" because the Internal Revenue Code, like ERISA, has an anti-alienation provision, 26 U.S.C. § 401(a)(13), which Yates would argue is applicable nonbankruptcy law for purposes of *Patterson*.

strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds. *Patterson*, *supra*, 504 U.S. at 764. Accordingly, it is clear that the Bankruptcy Trustee's attempt to alienate the assets of the Profit Sharing Plan should not be allowed. The Bankruptcy Trustee cannot deny that he is seeking to remove (Yates would argue "alienate") Profit Sharing Plan assets from the Profit Sharing Plan.

CONCLUSION

The Bankruptcy Trustee has not articulated any legal or factual basis that would prevent Yates from being an "employee" of Yates, P.C. and therefore a participant in the Profit Sharing Plan. For the reasons cited in Petitioner's Brief and this Reply, this Court should reverse the decision of the Sixth Circuit Court of Appeals holding that Yates is not an employee/participant in the Profit Sharing Plan, should overturn the grant of summary judgment in favor of the Bankruptcy Trustee and grant summary judgment in favor of Yates and the Profit Sharing Plan based on the fact that Yates is an employee of Yates, P.C., a participant in the Profit Sharing Plan and is entitled to enforce the Profit Sharing Plan's anti-alienation provisions as outlined in *Patterson*.

Respectfully submitted,

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No. 02-458

In The

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN AND RAYMOND B. YATES, TRUSTEE,

Petitioners,

v.

WILLIAM T. HENDON, TRUSTEE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF UNUMPROVIDENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether a working owner (in this case, a sole shareholder of a corporate employer) is a participant in a plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") where non-owner employees of the corporation are also covered under the same plan.

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INTEREST OF THE *AMICUS CURIAE*[1]

UNUMProvident Corporation is the parent holding company of UNUM Life Insurance Company of America, The Paul Revere Life Insurance Company, and Provident Life and Accident Insurance Company (collectively, the "UNUMProvident Companies"). The UNUMProvident Companies are three of the largest disability insurance carriers in the United States. They are authorized to issue individual and group disability policies in all 50 States. Hundreds of small employers purchase group and/or individual disability policies from the UNUMProvident Companies for the purpose of funding their ERISA-governed employee disability plans. In most cases, the business owner is covered under the same policy and/or the same policy form as the non-owner employees.

When there is a dispute over the payment of benefits under these policies, some jurisdictions (including the Sixth Circuit) hold that claims by working owners are governed by state law whereas ERISA preempts these same state law claims when they are brought by non-owner employees to recover benefits under the same plan. *See, e.g., Fugarino v. Hartford Life and Acc. Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993) (sole proprietor does not have standing to sue for benefits

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this Brief *amicus curiae*. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *Amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *Amicus*, made a monetary contribution for the preparation or submission of this brief.

under ERISA even though he participated in ERISA-governed health benefit plan that also covered non-owner employees); *Kwatcher v. Mass. Service Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (same result involving sole shareholder). The application of disparate bodies of state and federal law to the same benefit plan results in the potential for inconsistent and even conflicting applications of the same policy terms. Inconsistent and conflicting regulation ultimately increases the administrative and litigation costs of these plans, thereby harming the very employees that Congress sought to protect when it enacted ERISA.

This case arose out of a bankruptcy dispute and involves the question of whether Dr. Yates had standing to enforce the anti-alienation provision in his ERISA plan. *Hendon v. Yates*, 287 F.3d 521, 525 (6th Cir. 2002). However, this Court's decision will also determine whether a working owner has standing under ERISA, §502(a)(1)(B) to recover benefits under an ERISA-governed plan and whether any state law claims asserted by the working owner are preempted by ERISA. This is the issue that the UNUMProvident Companies and the employee benefit plans that they insure face on an ongoing basis in the lower federal and state courts. Indeed, several of the circuit court holdings that the petitioners relied on to establish a split in circuit court authority justifying a writ of certiorari involved claims for benefits under disability policies issued to ERISA plans by one of the UNUMProvident Companies or by other disability insurance carriers. *See, e.g., Sipma v. Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000); *Wolk v. Unum Life Ins. Co. of America*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *Engelhardt v. The Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998). By virtue of their extensive involvement in providing insured benefits to ERISA-governed disability plans, the UNUMProvident Companies have a strong interest in preserving the uniform regulation of the employee welfare benefit plans that they insure.

SUMMARY OF ARGUMENT

The primary purpose of Congress in enacting ERISA was to regulate employee benefit plans under a uniform body of federal law. Congress accomplished this purpose in two principal ways. First, it included a broad preemption clause which was "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). Second, Congress created a "comprehensive civil enforcement scheme" that is "one of the essential tools for accomplishing the stated purposes of ERISA." *Id.* at 52. This Court has held on several occasions that ERISA's civil enforcement scheme is the exclusive means to remedy disputes arising from the processing of ERISA benefit claims. *Pilot Life*, 481 U.S. at 54; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 54 (1987). Most recently, this Court noted that the civil enforcement scheme of ERISA is an example of an "overpowering federal policy" that employee benefit plan regulation be uniformly federal in character. *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___, 122 S.Ct. 2151, 2164, 153 L.Ed.2d 375, 396 (2002).

The decision below that working owners are not participants under ERISA and that they have no standing

to sue under ERISA's civil enforcement scheme, violates congressional intent for uniform federal regulation of employee benefit plans. In the context of a suit for plan benefits, the holding results in a disparity between the state law remedies that are available to the working owner and the federal law remedies that are available to non-owner employees. This is exactly what Congress sought to avoid: regulation of the same plan by multiple bodies of potentially conflicting laws. Fractured and conflicting regulation of employee benefit plans also leads to another result that Congress sought to avoid – increased costs of administering ERISA plans and the possibility that such plans will become so expensive that employers will cease to provide them in the first place. All of these problems are cured when working owners are considered participants under ERISA and have the same remedies as non-owner employees who are covered under the same benefit plan and who are subject to the same plan terms. The Sixth Circuit decision should be reversed.

ARGUMENT

A. A BENEFIT CLAIMANT'S STATUS AS A PARTICIPANT OR BENEFICIARY IMPACTS MULTIPLE ISSUES UNDER ERISA SUCH AS STANDING TO SUE, THE AVAILABILITY OF ERISA REMEDIES, AND PREEMPTION OF STATE LAW REMEDIES.

Dr. Yates' status as a participant under ERISA controls whether the anti-alienation provision of his ERISA plan applies to his interest in the plan. However, the question of a working owner's status as a participant or a beneficiary also arises in the context of whether the owner has standing to sue for ERISA plan benefits and the

related question of whether any state law claims brought by the owner are preempted by ERISA. Thus, a decision regarding Dr. Yates' participant status in the context of his bankruptcy dispute will also determine a working owner's participant status as it affects the administration of benefits under thousands of ERISA plans on a daily basis.

Standing to sue under ERISA is crucial to determining what federal remedies are available to a working owner. ERISA provides federal courts with jurisdiction of ERISA suits, but only where the plaintiff has a specific status under the statute, such as status as a participant or beneficiary. ERISA, §502(e)(1).[2] Section 502(a)(1)(B) provides an express cause of action for the recovery of plan benefits, but such a cause of action is expressly reserved only to participants and beneficiaries.[3] Some lower courts

[2] Section 502(e)(1) [29 U.S.C. §1132(e)(1)] states in pertinent part that "[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretrary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

[3] The statute provides that "[a] civil action may be brought – *by a participant or beneficiary* . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA, §502(a)(1)(B) (emphasis added). The statute defines a "participant" as: "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . . " ERISA, §3(7). The statute defines a "beneficiary" as: "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA, §3(8). The language of the statute makes it clear that status as either a participant or a

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that have held that working owners do not have standing to sue for benefits under ERISA also hold that ERISA simply does not apply to these claims even though they arise out of an ERISA-governed benefit plan. *See, e.g., Fugarino v. Hartford*, 969 F.2d at 186; *Kwatcher*, 879 F.2d at 965-66.

These same courts have also held that a working owner's standing to sue under ERISA controls what state law remedies are available to the working owner. Where a dispute arises out of the administration of benefits under an ERISA plan, this Court has held that ERISA's remedies are exclusive. *See, e.g., Moran, supra*; *Pilot Life, supra*; *Taylor, supra*. Any state law claims that purport to supplement or supplant ERISA's exclusive remedies are preempted, even where they are otherwise "saved" from preemption under ERISA's express preemption clause. *Id.* Even so, according to some lower courts, where a working owner does not have standing to sue under ERISA's civil enforcement scheme, state law remedies are not preempted by ERISA. *Fugarino, supra*; *Kwatcher, supra. See also Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 786 N.E.2d 817 (2003) (joint shareholder did not have standing to sue for disability benefits under ERISA and her state law claims against ERISA plan insurer were not preempted).

In summary, although not directly presented by the decision on review, the broader question of a working owner's standing to sue for plan benefits under

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beneficiary is sufficient to grant standing to pursue a suit for plan benefits.

§502(a)(1)(B) must be considered in this case. A working owner's standing to sue for plan benefits under ERISA is the most common context in which the standing issue arises. *Compare Santino v. Provident Life and Acc. Ins. Co.*, 276 F.3d 772 (6th Cir. 2001) (joint shareholder had standing to sue for benefits as participant); *Sipma v. Mass. Casualty, supra* (same); *Vega v. National Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999) (*en banc*) (husband and wife, as sole shareholders, had standing to sue for benefits as participants); *Engelhardt v. Paul Revere, supra* (joint shareholder has standing to sue for benefits as beneficiary); *Wolk v. UNUM, supra* (partner had standing to sue for plan benefits as beneficiary); *Prudential Ins. Co. of America v. Doe*, 76 F.3d 206 (8th Cir. 1996) (joint shareholder has standing to sue for benefits as beneficiary); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (husband and wife, as sole shareholders, had standing to sue for benefits as beneficiaries); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir.), *cert. denied*, 516 U.S. 942 (1995) (partner has standing to sue for benefits as beneficiary); *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) (sole shareholder had standing to sue for plan benefits as participant); *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) (partner has standing to sue for plan benefits as beneficiary) *with Agrawal v. Paul Revere, supra* (sole shareholder does not have standing to sue for plan benefits, either as participant or as beneficiary); *Fugarino v. Hartford, supra* (proprietor does not have standing to sue for plan benefits as participant); *Kwatcher v. Mass. Service, supra* (sole shareholder does not have standing to sue for plan benefits as participant); *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1989) (proprietor does not have standing to sue for

plan benefits as participant). This standing issue affects every ERISA plan that covers working owners.

B. THE DEPARTMENT OF LABOR DETERMINED LONG AGO THAT WORKING OWNERS ARE PARTICIPANTS WHERE THEY ARE COVERED BY AN EMPLOYEE BENEFIT PLAN THAT INCLUDES NON-OWNER EMPLOYEES.

Unlike some federal discrimination statutes such as the Americans With Disabilities Act, ERISA does not include any "small employer exemption" nor is there any evidence that Congress intended to exclude small employers from ERISA. Consistent with congressional intent that ERISA have broad application to employers of all sizes, the Department of Labor ("DOL") issued a regulation defining the term "employee benefit plan" under ERISA. Under the regulation, plans with as few as one employee-participant, are governed by ERISA:

> For purposes of Title I of the Act and this chapter, the term 'employee benefit plan' shall not include any plan, fund, or program . . . under which *no employees* are participants covered under the plan . . . For example, a so-called 'Keogh' or 'H.R. 10' plan under which only partners or *only a sole proprietor* are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees in addition to the self-employed individuals are participants covered under the plan, will be covered under Title I.

29 C.F.R. §2510.3-3(b) (emphasis added). For purposes of determining whether a plan covers at least one employee,

a sole owner and his/her spouse are not considered employees under the regulation:

> For purposes of this section . . . [a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, *which is wholly owned by the individual or by the individual and his or her spouse. . . .*

Id. at §2510.3-3(c) (emphasis added).

Once an ERISA plan is established, the DOL has consistently concluded that all persons covered by the plan, including working owners, are considered participants in the plan. For example, the DOL was presented with the issue of whether a partner or sole proprietor is subject to ERISA's civil enforcement provision:

> [W]hether Title I [including the preemption and claims review procedures] of ERISA applies to group medical programs which provide medical coverage to a sole proprietor or a partner in an unincorporated business, as well as common law employees, and whether the claims made by such a sole proprietor or partner would be subject to the ERISA claims procedure.

[Letter from Robert J. Doyle, Director of Regulations and Interpretations, Department of Labor, to Susan Katz Hoffman, at 1 (July 31, 1992) (emphasis added) (attached as Appendix ("App.") 1).] After reviewing the breadth of ERISA preemption, the DOL stated that, although sole proprietors and partners are not considered "employees" for purposes of deciding whether a benefit plan has been established, *once a plan is established* (because other employees are covered by the plan in addition to the sole proprietor or partner), sole proprietors and partners are

participants and beneficiaries of the plan and are bound by Title I of ERISA, including the preemption and claims review provisions. *Id.* In other words, once a plan has been established, sole proprietors, partners, and other owners who are covered under the plan are subject to ERISA's claims procedures and are considered beneficiaries and/or participants for purposes of those claims. *See* DOL Reporting and Disclosure Regulations, 40 Fed. Reg. 34525, 34528 (August 15, 1975) (definition of "employee" in §2510.3-3 is for the limited purpose of determining whether a plan has any employees, and thus whether an ERISA plan exists; hence, the regulations are revised to expressly limit the definition of "employee" to §2510.3-3 in order to avoid excluding the "self-employed" from ERISA).

The 1992 DOL information letter is consistent with previous agency opinions on the issue. In DOL Advisory Opinion 79-8A (attached as App. 19), the agency stated that the wife of a partner in a partnership whose employees participated in a multi-employer pension plan was not automatically excluded from participation in the plan merely because the definition of an "employee" in §2510.3-3 is somewhat restrictive. The agency stated that the regulatory definition of "employee" was not intended to dictate a person's status under a plan once an ERISA plan is established. Likewise, in DOL Advisory Opinion 81-54A (attached as App. 14), the DOL advised as to which individuals would be counted as participants and/or beneficiaries in a scholarship fund for purposes of ERISA's reporting and disclosure requirements. Again, the agency read the terms "participant" and "beneficiary" broadly. It concluded that the term "beneficiary" would include the children of eligible individuals who may become entitled to a scholarship from the fund and that all individuals

meeting the eligibility criteria "*of the Fund*" would be participants and/or beneficiaries in accordance with ERISA. In other words, it was the eligibility criteria "of the Fund" that controlled participant and beneficiary status.

Most recently, the DOL reaffirmed its longstanding position that "the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include 'working owners' within the definition of 'participant' for purposes of Title I of ERISA." DOL Advisory Opinion 99-04 (attached as App. 4).

The DOL's regulatory interpretation of ERISA is entitled to deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that where an administrative agency is authorized to regulate a particular statute and where the agency's regulation is a "permissible construction" of the statute, a court must defer to the agency's interpretation. *Id.* at 843-44 ("[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). In reviewing an agency's interpretation, "the question before [the court is] not whether in its view the concept is 'inappropriate' in the general context of a program . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." *Id.* at 844. Thus, the DOL's regulation that a benefit plan is governed by ERISA where it covers at least one employee is entitled to deference. *See, e.g., Black & Decker Disability Plan v. Nord*, ___ U.S. ___, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (deferring to DOL claim regulations in holding that the treating physician rule does not apply to ERISA disability benefit determinations).

While the DOL's subsequent advisory opinions interpreting its regulation may not be entitled to *Chevron*-style deference *per se*, DOL opinions interpreting its own regulation should certainly be persuasive. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, ___ U.S. ___, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (EEOC guidelines under the ADA are persuasive). *See also Cvelbar v. CBI Illinois*, 106 F.3d 1368, 1375 (7th Cir.), *cert. denied*, 522 U.S. 812 (1997) ("Although the position of the Secretary [of Labor], even when contained in an opinion letter of the Department, is not binding upon this court, the views of the agency charged with the administration of the statute carry considerable weight."). The DOL's "bright line" definition that working owners are "participants" is certainly a "permissible construction" of ERISA. Whether entitled to deference under the *Chevron* doctrine or whether it is merely persuasive, the DOL's position on this issue lends much needed consistency and predictability to the statute as well as to the administration of ERISA-governed plans.

C. THE MAJORITY OF CIRCUIT COURTS HOLD THAT WORKING OWNERS HAVE STANDING TO SUE FOR PLAN BENEFITS UNDER ERISA, CONCLUDING THAT SUCH A RESULT IS NECESSARY TO ENSURE UNIFORM REGULATION OF EMPLOYEE BENEFIT PLANS AND CONSISTENT APPLICATION OF PLAN TERMS.

The majority of circuits have interpreted ERISA to grant standing to working owners, including sole shareholders of corporate employers. For example, in *Madonia*, *supra*, the Fourth Circuit held that a sole shareholder of a medical corporation had standing to sue as a participant under ERISA. Among other things, the Fourth Circuit held

that a working owner's standing to sue under ERISA was consistent with congressional intent for uniform federal regulation of employee benefit plans:

> By concluding that sole shareholders can be considered 'participants' in their companies' employee welfare benefit plans, we likewise avoid the situation in which two separate bodies of law would govern a corporation's employee benefits claims. In this particular case, it would seem anomalous to have [the shareholder] seeking recovery under state law theories and [other employees] suing under ERISA. In enacting ERISA, Congress drafted its 'most sweeping federal preemption statute' in order to achieve uniformity and consistency in the law governing employee benefits . . . Disallowing shareholders such as [the plaintiff] from being plan 'participants' would result in disparate treatment of corporate employees' claims, thereby frustrating the statutory purpose of ensuring similar treatment for all claims relating to employee benefit plans.

Id. at 450.

The Fifth Circuit, sitting *en banc*, has held that where a corporate employer is owned by a husband and wife, and where the corporation sponsors an ERISA health benefits plan, the shareholders are participants under ERISA with standing to sue for plan benefits. *Vega v. National Life Ins. Services*, *supra*. As in *Madonia* and the present case, the Fifth Circuit held that the health plan was governed by ERISA because it covered at least one employee in addition to the spouse/shareholders. Once an ERISA plan was established, the Fifth Circuit held that the shareholders were considered participants in the plan. The Fifth Circuit was "persuaded by the reasoning in *Madonia*", including

that court's statement that such a result "promoted Congress' objective of achieving uniformity through the enactment of ERISA because it fostered consistency in the law governing employee benefits." 188 F.3d at 294.

Vega and *Madonia* are part of a long line of circuit court authority holding that working owners of ERISA plan sponsors have standing to sue for plan benefits under ERISA in large part because a contrary holding would frustrate Congress' objective of creating uniform regulation of employee benefit plans. *See, e.g., Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1303-04 (11th Cir. 2001) ("This conclusion [that a sole shareholder has standing to sue under ERISA] also comports with common sense . . . If we accepted [the shareholder's] reading of the [DOL] regulation, then he and his wife would have a different set of rights and remedies than the other employees covered by the same plan."); *Wolk v. Unum Life Ins. Co. of America*, 186 F.3d at 357 ("As several courts of appeals have noted, 'to hold otherwise would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Such a scenario would frustrate Congress' intent of achieving uniformity in the law governing employment benefits."); *Prudential v. Doe*, 76 F.3d at 209 (a working owner's standing to pursue ERISA remedies was supported by the policy rationale that avoided the "anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA"); *Robinson v. Linomaz*, 58 F.3d at 369 (noting that its holding that working owners have standing under ERISA once an ERISA plan is established is consistent with congressional intent and that "it would

be anomalous to have those persons benefiting from [the plan] governed by two disparate sets of legal obligations"); *Peterson v. American Health*, 48 F.3d at 409 ("To hold [that a working owner does not have standing to sue under ERISA] would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Such a scenario would frustrate Congress' intent of achieving uniformity in the law governing employment benefits."); *Harper v. American Chambers*, 898 F.2d at 1434-35 ("[O]ur construction of the statutes defining the [working owners] as ERISA beneficiaries is consonant with the ERISA statutory scheme.").[4] Even the Sixth

[4] Several of the circuit court holdings that working owners have standing to sue under ERISA are based on the owner's status as a beneficiary, apart from his or her status as a participant. These decisions are based on the plain language of ERISA's definition of a beneficiary, which includes not only persons who are designated by a participant to receive plan benefits (e.g., such as in a life insurance policy), but also includes "a person . . . designated by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA, §3(8) [29 U.S.C. §1002(8)]. These courts have held that this definition is clear and unambiguous and includes working owners who are otherwise covered under the terms of the ERISA plan. *See, e.g., Gilbert v. Alta Health*, 276 F.3d at 1295 (a sole shareholder has standing as a beneficiary under an ERISA plan where he alleges that he is entitled to benefits under the terms of the plan); *Wolk v. Unum*, 186 F.3d at 356 (a plain language interpretation of ERISA dictates that a partner who alleges that he is entitled to benefits under the terms of an ERISA plan has standing as a beneficiary of that plan); *Prudential v. Doe*, 76 F.3d at 209-10 (a joint shareholder is a beneficiary where he alleges that he is entitled to benefits under an ERISA plan); *Robinson v. Linomaz*, 58 F.3d at 369 (the plain language of the statute dictates that a joint shareholder is a beneficiary); *Peterson v. American Life*, 48 F.3d at 409 (because a partner is designated to receive benefits under an ERISA plan, the plain language of the statute dictates that the partner is a beneficiary of the plan); *Harper v. American Chambers*, 898 F.3d at

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Circuit, which is one of two circuits to preclude sole shareholders from participant status under ERISA,[5] has acknowledged the patent inconsistency in doing so:

> When self-employed individuals are excluded from classification as participant or beneficiary, the self-employed lack standing to enforce their rights under ERISA and can sue under state law theories. ERISA was originally put into place to protect the interests of employees by imposing duties on those who fund and administer the employee benefit plans; with these protections come limitations on employees' rights to recover state law remedies. Although self-employed individuals may not need the protections offered by ERISA, because they are likely to look out for themselves in the administration of the plan, it does not follow that once a self-employed person chooses to participate in an ERISA plan and gain benefits thereunder, she should be free from the

1434-35 (same). *See also Engelhardt v. Paul Revere*, 139 F.3d at 1351 (a joint shareholder is a beneficiary where he is designated to receive benefits under an ERISA plan). Because ERISA's civil enforcement provision permits suits for plan benefits by both participants and beneficiaries, these cases hold that working owners have standing to sue under ERISA as beneficiaries even if for some reason they are not considered participants. ERISA, §502(a)(1)(B). If this Court holds that working owners are considered participants, the question of their status as beneficiaries would be moot in most cases. Even so, the question of beneficiary status is not presented in the petition before this Court and is not at issue in this case.

[5] The Sixth Circuit has held that joint shareholders of a corporate plan sponsor are participants under ERISA, even though sole shareholders, such as Dr. Yates, are not considered participants. *Compare Santino v. Provident*, *supra* (joint shareholders covered under an ERISA plan are considered participants) *with Hendon v. Yates*, *supra* (a sole shareholder is not a participant).

> limitations imposed upon her employees. Under *Fugarino*, a self-employed individual who participates in a disability plan that covers him and all of his employees will have a unique advantage: the self-employed individual can pursue a parade of state law claims that are withheld from his employees by preemption.

Agrawal v. Paul Revere, 205 F.3d at 303.

D. THE SIXTH CIRCUIT DECISION ON REVIEW CREATES INCONSISTENCY IN THE REGULATION OF ERISA PLANS AND IN THE APPLICATION OF ERISA PLAN TERMS, CONTRARY TO THE INTENT OF CONGRESS.

1. Congress Enacted ERISA To Establish Uniform Regulation Of Employee Benefit Plans In Order To Reduce The Costs Of Administering Such Plans And To Thereby Make Such Plans Available To A Greater Number Of Employees.

Congress enacted ERISA in order to promote a cost-effective private employee benefit plan system through uniform fiduciary standards and remedies. A single regulatory framework allows simplicity in plan administration. *See, e.g., Shaw v. Delta Air Lines*, 463 U.S. 85, 99 n. 20 (1983). *See also Ft. Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987) (simplicity in plan administration is achieved by establishing "a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits"). A uniform system of benefit plan regulation leads to lower administrative costs and broader availability of benefits to employees. As this Court stated in *Varity Corporation v. Howe*, 516 U.S. 489 (1996), one of the "competing

purposes" of Congress was "its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Id.* at 497.

The importance of regulatory uniformity within an employee benefit plan is amply illustrated by the decision in *Shaw*, *supra*. One of the issues in that case was whether state-mandated disability benefits that were otherwise expressly exempted from ERISA fell within federal ERISA regulation where they were administered as part of a plan that also included ERISA-governed benefits. 463 U.S. at 107-08. This Court noted that ERISA was enacted to avoid situations where "one portion of a multibenefit plan would be subject only to state regulation, while other portions would be exclusively within the federal domain." *Id.* at 107. *Shaw* recognized that "[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent." *Id.* at 107-08. Accordingly, *Shaw* held that the entire plan was regulated by ERISA, including the "non-ERISA" benefits. 463 U.S. at 108.

2. The Decision Below Creates Inconsistency In The Regulation And Application Of ERISA Plan Terms And Is Contrary To Congressional Intent For Uniform Regulation And Lower Benefit Costs.

Exclusion of working owners from ERISA's civil enforcement scheme creates a serious dysfunction within ERISA's civil enforcement scheme. This schism permits working owners to sue plan fiduciaries, who are required to administer the entire plan under federal law, for violations of state law. Other covered employees are required to

sue under federal law. Allowing working owners to maintain state law causes of action outside of ERISA's preemptive sphere creates the "mutually exclusive pockets of federal and state jurisdiction within a plan," against which this Court warned in *Shaw*. Such multiplicity of regulation and open-ended administrative and financial burdens are precisely the problems that ERISA was intended to avoid.

Exclusion of working owners from ERISA's civil enforcement scheme also creates an irony that was certainly not anticipated by Congress: because owners would have access to state law damages remedies that are not available under ERISA, working owners would have broader remedies than are available to non-owner employees. The availability of state law damages increases the cost of providing benefits, eventually reaching the point of discouraging these same owners from providing benefits to their employees in the first place. This is certainly contrary to the "protection" that Congress intended ERISA to afford working men and women.

Exclusion of working owners from ERISA's civil enforcement scheme also creates a dysfunction between the civil enforcement scheme and ERISA's other regulatory provisions. The petitioner and the United States, as *amicus curiae,* have demonstrated that multiple provisions of the statute and the Internal Revenue Code provide that working owners who participate in ERISA plans are regulated by ERISA. It would make no sense if some portions of ERISA regulated these owners' participation in employee benefit plans yet the civil enforcement provisions were found not to regulate the owners' claims for benefits under the same plans.

Exclusion of working owners from ERISA's civil enforcement scheme also results in inconsistent application of the same plan terms, as demonstrated by the following scenarios:

- Assume that a small corporation purchases long term disability insurance for its full-time employees, including the sole shareholder. Assume also that the plan expressly provides discretion to the insurer to determine eligibility for benefits. If a non-owner employee applies for benefits and the insurer denies the claim based on a determination that the employee's medical records do not evidence sufficient restrictions and limitations to qualify for the employee to be considered disabled under the policy, the employee would be required to sue under ERISA. Under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the reviewing court would defer to the insurer's factual determination and affirm that determination unless the employee proved that it was an abuse of discretion. However, if the same claim was filed by the sole shareholder and the shareholder was permitted to sue under state law, the abuse of discretion standard would most likely not apply and the court would be required to determine whether the insurer was correct in denying benefits. Depending on the evidence, the reviewing court could determine under state law that the denial of the owner's claim was wrong and should be overturned whereas, in the case of the non-owner employee, the same court might determine under ERISA that, based on the same evidence, the decision was not an abuse of discretion and should be affirmed.

- Assume the same facts as above, except that the disability benefit claim is denied based on the insurer's interpretation of a plan term. In the case of the non-owner employee's claim, a reviewing court would be required to uphold the insurer's interpretation if it

was reasonable, even if the court would have applied a different interpretation. In the case of the shareholder's claim, the reviewing court would be in the position of applying its own interpretation of the plan term that would be contrary to the interpretation applied by the insurer. In other words, the same term in the same policy could be subject to conflicting interpretations solely because one claim is brought by the shareholder under state law and the other claim is brought by a non-owner employee under ERISA. The non-owner employee would be denied benefits whereas the shareholder would collect benefits even though both denials were based on the same plan terms.

- Assume the same facts as above, except that neither the working owner nor the non-owner employee exhaust administrative appeal procedures before filing suit. Because the non-owner's claim is governed by ERISA, he or she would be required to exhaust the plan's administrative remedies before pursuing the lawsuit. *See, e.g., Norris v. Citibank, NA Disability Plan*, 308 F.3d 880 (8th Cir. 2002) (discussing exhaustion requirement under ERISA). If the working owner's claim is governed by state law, there is no corresponding exhaustion requirement, allowing the working owner to bypass administrative remedies at his or her discretion. Similarly, once the case reaches court, the non-owner's ERISA claim will be limited to a review of the administrative record, a requirement also not found under state law. *See, e.g., Perlman v. Swiss Bank Long Term Disability Plan*, 195 F.3d 975 (7th Cir. 1999) (discussing limited scope of review under ERISA). Pre-trial discovery is also limited under ERISA whereas there is no limitation under state law. *See, e.g., Perlman v. Swiss Bank, supra.*

The above examples illustrate the most fundamental defect in the decision below: exclusion of working owners from ERISA's remedies results in inconsistent and conflicting applications of plan terms and plan fiduciary benefit decisions. It certainly was not Congress' intent that ERISA should be so narrow that it allows working owners who are covered under the same benefit plan as other employees to have a better opportunity to collect benefits than their non-owner employees. The intent of Congress was that if the same plan terms apply to all persons covered under the plan, those terms should be applied consistently to all persons covered by the plan. No other result makes any sense.

E. A "BRIGHT LINE" RULE THAT WORKING OWNERS ARE PARTICIPANTS IS THE ONLY APPROACH CONSISTENT WITH THE STATUTORY LANGUAGE OF ERISA, THIS COURT'S PRECEDENTS AND CONGRESS' INTENT TO PROVIDE PLAN ADMINISTRATORS WITH CONSISTENCY AND PREDICTABILITY IN DETERMINING WHO IS A PARTICIPANT UNDER THE PLAN.

In addition to determining whether working owners have standing to sue for benefits under ERISA, the status of working owners as plan participants also governs whether ERISA-mandated claim procedures apply to benefit claims filed by working owners. ERISA, §503 [29 U.S.C. §1133] requires a two-stage process whereby the claims administrator makes an initial determination of benefit eligibility and where the participant is guaranteed at least one level of review. *Id.* The DOL has issued lengthy and detailed regulations governing the time periods applicable to these administrative reviews, the notice requirements applicable to benefit denials, what

persons are required to review the claim (including medical personnel where appropriate), and related issues. 29 C.F.R. §2560.503-1. As discussed above, the DOL has also issued multiple opinions that where a working owner is covered under a plan that also covers non-owner employees, claims for benefits filed by the working owner are subject to ERISA.

The DOL's "bright line" determination that working owners are participants is directly consistent with the language of ERISA and the manner in which this Court has required that language to be interpreted. Importantly, the DOL's approach also lends regulatory uniformity and predictability to the claims process, thereby further ensuring lower costs of maintaining ERISA plans.

It is well settled that the starting point for proper statutory construction is the language of the statute itself. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). Here the DOL's position is grounded on multiple provisions of ERISA as well as related provisions of the tax code. *See, e.g.*, DOL Advisory Opinion 99-04A (App. 4.) These statutory provisions include working owners as participants under ERISA and alleviate any need to resort to the common law, as this Court did in *Darden*.

In *Darden*, this Court was charged with interpreting the term "employee" in ERISA *vis a vis independent contractors*. 503 U.S. at 324. Looking to the statute *on that specific point*, the Court held that "Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.* Thus, in the absence of any statutory

provisions that clarified whether or not an independent contractor was a participant under ERISA, and faced with two previous situations where the Court had defined the term "employee" broadly in the absence of such legislative guidance, only to see Congress subsequently amend the statute to specify a common law meaning, the Court reasonably applied a common law definition to the term. *Id.* at 324-25.

Likewise, in *Clackamas*, *supra*, this Court incorporated common law principles into the ADA to determine the employee status of corporate shareholders. In that case, although no ADA provisions specifically resolved the question, the statutory provisions the Court found most relevant, (the ADA's exemption for small employers) actually mitigated against adopting a broader definition for the term than that dictated by common law. 123 S.Ct. at 1678-79.

Unlike the independent contractor issue in *Darden* and the ADA issue in *Clackamas*, there are statutory provisions in both ERISA and corresponding tax code provisions that do explain the participant status of working owners and that do require that working owners be considered participants when they participate in ERISA-governed plans with other non-owner employees. Unlike *Darden* and *Clackamas*, then, there is no reason to resort to the common law to resolve the issue in this case. And unlike *Darden* and *Clackamas*, resort to common law here would both "thwart the congressional design [and] lead to absurd results." *Darden*, 503 U.S. at 323.

There are also other considerations that distinguish this case from *Darden* and *Clackamas*. First, both *Darden* and *Clackamas* anticipate that each issue must be

addressed on its own and that even if a common law test is utilized, the applicable criteria may differ from situation to situation. For example, this Court applied different factors for determining employer-employee status under the ADA in *Clackamas* than it did for determining independent contractor-employee status in *Darden*. *Clackamas*, 123 S.Ct. at 1678 n. 4 (noting that the *Darden* common law "factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees"). Neither case mandates a hard and fast rule that must be applied under all circumstances where the question is whether someone is a participant or an "employee." Neither case mandates a common law test in all situations under ERISA.

Second, unlike the ADA where a person cannot be both an employer and an employee, ERISA anticipates the possibility in several contexts that a person may "wear two hats." For example, this Court has held that an employer may be a fiduciary of an ERISA plan with duties to participants and beneficiaries for some purposes even though the same employer may act as an employer with the right to act in its own interests for other purposes, even if those interests are detrimental to participants and beneficiaries. *See, e.g., Lockheed Corporation v. Spink*, 517 U.S. 882, 890 (1996) (employer, who is a fiduciary for some purposes, may amend plan terms to reduce available benefits because in making plan design decisions, the employer does not act as a fiduciary). Thus, the possibility that a working owner may act as an employer in some situations with respect to an ERISA plan and as a participant-employee in other situations with respect to the same ERISA plan is not at all surprising or inconsistent with the statutory design.

Third, the considerations in *Clackamas* that counseled in favor of adopting a multi-factor common law test are not applicable in this case. As stated, the ADA incorporates an exemption for small employers, evidencing congressional intent that a large group of potentially covered entities will not be subject to regulation under the ADA. *Clackamas*, 123 S.Ct. at 1678-79. This Court specifically cited the exemption as a "countervailing consideration" mitigating against adopting a definition broader than the common law. *Id.*

Here there is no such "countervailing consideration." ERISA has no small employer exemption. To the contrary, ERISA anticipates broad application, even to plans that cover only one employee. And as noted above, while ERISA may be silent as to whether its broad application applies to independent contractors, the same cannot be said with respect to "working owners." Furthermore, *Clackamas* places substantial weight on the opinions of the EEOC in regulating the ADA. As noted above, similar weight should be placed on the DOL in regulating ERISA.

Finally, unlike the ADA, this Court has already recognized that the congressional policy of uniformity in the regulation of ERISA plans overrides even explicit statutory exemptions. This Court has held that even where certain benefits are expressly excluded from ERISA, they are governed by ERISA where they are administered as part of an ERISA benefit program. *Shaw, supra. Shaw* provides substantial guidance in determining the result in this case. Even if a working owner would not be considered an "employee" generally under one or another common law test, the working owner should be regulated by ERISA as

a participant where he or she participates in an ERISA-governed plan that covers non-owner employees. No other result can satisfy the need for uniform regulation.

The petitioner suggests that the common law supports participant status for Dr. Yates. This is certainly true with respect to a shareholder of a corporation. For example, in *Madonia, supra*, the Fourth Circuit held that common law principles supported the conclusion that a sole shareholder was an employee of the corporation where the shareholder was subject to the same treatment as non-owner employees with respect to compensation and taxes, and where the common law recognized the distinction between a corporate entity and its owner. 11 F.3d at 449. In the context of corporate shareholders, application of the common law rule which respects the corporate form and includes as an "employee" any individual who chooses to accept the benefits and burdens of such a corporate form, makes eminent sense and promotes the interests of uniformity to a greater extent than a "multi-factor" common law test such as the one adopted in *Clackamas* and *Darden*.

However, such a common law test is problematic with respect to other working owners such as proprietors and partners. Frequently, proprietors and partners are treated differently from non-owner employees with respect to compensation and there is no corresponding distinction in the common law between proprietors and partners on the one hand and their business entities on the other hand. Yet, where proprietors and partners are covered under the same ERISA-governed plan as non-owner employees, there is the same potential for varied and conflicting regulation within a plan as where the working owner is a shareholder.

Thus, it is clear that importation of the common law to resolve the issue at hand will inevitably "thwart the congressional design" which not only specifically contemplates working owners as employees but also requires both uniformity and predictability. *Darden*, 503 U.S. at 326 (rejecting lower court's analysis because the analysis was "unable to furnish predictable results"). Resorting to a multi-factor test implies that some working owners will be excluded from participant status, leaving the plans in which they participate along with non-owner employees subject to varied and potentially conflicting laws, as discussed above. Application of multiple fact sensitive criteria to determine participant status will also destroy predictability. This type of analysis might be practical when one is dealing with issues that are resolved in litigation, such as whether an employer meets the minimum threshold requirement of the ADA. However, it does not make sense when laypersons must determine participant status in a pre-litigation administrative environment in order to determine what procedures are applicable to a working owner's claim for plan benefits. In fact, the time periods for making claim decisions under ERISA plans, some of which are as short as 24 hours, make it impossible for an ERISA plan claims administrator to make such a determination based on a multi-factor common law test. The ADA does not incorporate an administrative process that is similar to ERISA's claim process. In the ERISA claim administration environment, only a "bright line" test will suffice. Otherwise, hundreds of claim administrators would be required to conduct what would amount to full discovery, just to determine whether or not ERISA claim procedures are applicable in the first place. This would amount to the type of "absurd results" this Court warned against in *Darden*. 503 U.S. at 323.

Certainly Congress did not intend the claim review process required by section 503 to be such a complicated, expensive and unpredictable process. If claim administrators can apply the same administrative procedures to all persons making claims under the same plan, including working owners, the entire process is simplified and uniform. This is exactly what Congress intended.

CONCLUSION

For the reasons stated herein, this Court should reverse the ruling below.

Respectfully submitted,

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August 11, 2003

U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington, D.C. 20210

July 31, 1992

[SEAL]

Ms. Susan Katz Hoffman
Pepper, Hamiltan & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103-2799

Dear Ms. Hoffman:

This is in reply to your request for an information letter regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether title I of ERISA applies to group medical programs which provide medical coverage to a sole proprietor or a partner in an unincorporated business, as well as common law employees, and whether the claims made by such a sole proprietor or partner would be subject to the ERISA claims procedure.

Section 4(a) of title I of ERISA generally provides that any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce, by any employee organization representing employees engaged in commerce or in any industry or activity effecting commerce, or by both will be covered by that title unless excluded in subparagraph (b). A program providing medical coverage would generally be considered to be providing benefits among those included in the definition of an employee welfare benefit plan.

The definition of the term "employee benefit plan" contained in section 3(3) of title I of ERISA includes both employee welfare benefit plans and employee pension benefit plans. In regulation 29 CFR 2510.3-3, the Department of Labor (the Department) clarified the definition of the term "employee benefit plan" for the purposes of title I of ERISA. Paragraph (b) of §2510.3-3 provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . ." For purposes of the regulation, paragraph (c) of §2510.3-3 provides that certain individuals shall not be deemed to be employees. Specifically §2510.3-3(c) provides that:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual and his or her spouse, and
>
> (2) A partner in a partnership and his or her Spouse shall not be deemed to be employees with respect to the partnership.

If a benefit program were limited to individuals identified in §2510.3-3(c), the benefit program would not constitute an employee benefit plan described in section 3(3) of title I of ERISA and, therefore, would not be covered by that title. If, on the other hand, the benefit program includes one or more common law employees as well as an individual described in §2510.3-3(c), such program would be an employee benefit plan within the meaning of section 3(3) of title I of ERISA.

Employee benefit plans covered Under title I of ERISA must comply with the claims procedure provisions of section 503 of title I of ERISA and the Department's regulation concerning claims procedures, 29 CFR 2560.503-1. A plan's claims procedure applies to any participant or beneficiary covered under the employee benefit plan, including any participant or beneficiary described in §2510.3-3(c).

We hope this information will be helpful to you.

Sincerely,

/s/ Robert J. Doyle
ROBERT J. DOYLE
Director of Regulations
and Interpretations

Department of Labor

Pension & Welfare Benefit Programs

OPINION 99-04 A

February 4, 1999

REQUEST BY:

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David Potts-Dupre, Esq.
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OPINION:

This is in response to your request for an advisory opinion concerning the definition of "participant" provided in section 3(7) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether individuals who own business enterprises, either wholly or in part, and who provide personal services to those businesses may be "participants," within the meaning of section 3(7) of ERISA, in a multiemployer employee benefit plan. You state that the business enterprises that are the subject of this request include businesses that are operated as corporations, sole proprietorships, and partnerships.

You submit your request on behalf of the National Electrical Benefit Fund (the NEBF), a multiemployer pension plan established jointly by the International Brotherhood of Electrical Workers (IBEW) and the National Electrical Contractors Association (NECA) pursuant

to collective bargaining. You describe the NEBF as the largest construction industry fund in the United States, with approximately 375,000 participants, over 14,000 contributing employers, and plan assets of almost five billion dollars.

The documents that you have submitted indicate that an individual can become eligible to participate in the NEBF only as a result of an employer's having executed a participation agreement with the NEBF, obligating the employer to make contributions on behalf of at least some of its employees. See Restated Employees Benefit Agreement and Trust for the National Electrical Benefit Fund (hereinafter Trust Agreement), Part I, Provision 4; sections 1.7, 1.8, 1.18, 6.3.3. An employer must agree at a minimum to make contributions on behalf of its bargaining unit employees. Id. section 6.3.1. Such an employer may elect, in addition, to contribute on behalf of its "non-bargaining unit employees." An employer may contribute on behalf of all "non-bargaining unit employees" or only those non-bargaining unit employees who were formerly bargaining unit members ("alumni"). Id.

With respect to bargaining unit employees, a participating employer must contribute to the NEBF an amount equal to three percent of "all wages and other compensation paid to, or accrued by, the Covered Employees in the . . . bargaining unit for services performed for the Covered Employer." Id. section 6.2.1. For non-bargaining unit employees, the employer must contribute to the NEBF an amount equal to the lesser of

> "(a) 3% of all wages and other compensation which the Covered Employer would pay, or which the [non-bargaining unit] Covered Employees

> would accrue, if the Covered Employees were receiving the wage rate received by the highest number of employees in the appropriate . . . bargaining unit and working the normal straight time hours provided for in the appropriate labor agreement, or (b) 3% of all wages and other compensation paid to, or accrued by, the [non-bargaining unit] Covered Employees for services performed for the Covered Employer. . . ."

Id. Section 6.2.2.

The documents that you have supplied indicate that the NEBF provides a pension benefit, which may be paid as an early retirement pension or a normal retirement pension, and a disability benefit. A participant becomes vested in his or her pension benefit upon earning at least five vesting service credits.[1] Pension benefits for vested participants are calculated by multiplying the participant's benefit service credits[2] by fixed dollar amounts that are specified in the plan. As a result, the amount of a participant's monthly pension benefit is not dependent upon the participant's actual income prior to retirement or the actual amount of contributions that an employer made on his or her behalf, but rather upon seniority in the NEBF.

[1] One vesting service credit is earned for each year after 1965 in which a participant is credited with 1000 hours of covered service for covered employment (employment during a period for which an employer is obligated to make contributions for that employee).

[2] One benefit service credit is similarly earned for each year after 1965 in which a participant is credited with 1000 hours of covered employment.

You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners"[3] to be treated as employees eligible to participate in the NEBF and therefore to become participants in the NEBF[4] The eligible "working owners" include any "owner that earns wages or self-employment income from a company," including sole proprietors of unincorporated businesses. You indicate that the working owners who currently participate in the NEBF are journeyman electricians who had worked initially as bargaining unit members for other employers that contributed to the NEBF on their behalf. They subsequently acquired ownership interests in those employers or started their own electrical businesses, sometimes in partnership with other similarly situated individuals, sometimes by creating wholly-owned corporations, and sometimes operating as sole proprietors. They continue to work as electricians and in some cases employ other union members covered by the NEBF. Most of these working owners had earned vested pension benefits in the NEBF based on their previous service as bargaining unit employees, and they began accruing additional service

[3] By the term "working owner," you apparently mean any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

[4] This current practice has been followed only since January, 1994. In the course of its history (since its creation in the early 1960's), the NEBF's practices have varied regarding participation by individuals who have equity ownership rights in business enterprises that operate in the industry covered by the IBEW.

credits when the NEBF changed its eligibility rules in 1994 to permit working owners to participate.

You represent that the employer's payroll reports, submitted monthly to the NEBF, are used to determine an employer's contributions, based on the working owner's reported "wages," and a working owner's service credits, based on the working owner's reported hours of service. You further represent that reporting employers determine a working owner's "wages" by determining the greater of the working owner's actual gross earnings subject to employment tax for that month or the amount the working owner would have earned if he had worked at normal straight-time hours for the month at the applicable journeyman's rate. The working owner's hours of service are reported as the actual hours the working owner worked for the business during the month.

Section 3(7) of Title I of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(6) in turn defines an "employee" as "any individual employed by an employer." Finally, section 3(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

Title I of ERISA contains multiple indications, albeit indirect, that Congress assumed that a "working owner"

could be a "participant" in an employee benefit plan sponsored by the business in which that working owner held an ownership right, regardless of the legal form in which the business was operated. For example, section 401(a)(2) exempts certain partnership agreements from the fiduciary provisions of Part 4. This exemption would be meaningless if the partnership agreements themselves (which cover only partners, one of the categories of "working owners") were not otherwise plans covered by Title I. Further, section 403(b)(3)(A) specifically exempts from the trust requirement of section 403(a) a plan "some or all of the participants of which are employees described in section 401(c)(1) of the Code [emphasis added]." This exemption takes as its basis the assumption that the employees described in Code section 401(c)(1), namely self-employed individuals (including "working owners"), are legitimate "participants" within the meaning of Title I. Also, section 408(b)(1) exempts from section 406's prohibition of specified transactions certain non-discriminatory loans made to plan participants, including highly compensated employees, but section 408(d)(1) eliminates that exemption for owner-employees as defined in section 401(c)(3) of the Code. Inasmuch as the owner-employers described in Code section 401(c)(3) are sole proprietors and more than ten-percent partners, it is clear that the provisions in section 408 of Title I assume that such "working owners" are "participants" in the plans from which those loans would be made.

These indications of Congressional intent are supported and reinforced by the treatment of "working owners" under

the provisions of Title II and Title IV of ERISA.[5] Section 401(c) of the Internal Revenue Code (the Code) provides that self-employed individuals are included as "employees" under Code section 401(a) to the extent that they have earned income "with respect to a trade or business in which personal services of the [individual] are a material income-producing factor." Code section 401(c)(2)(A). Code section 401(c) further imposes specific additional requirements on tax-qualified pension plans that provide benefits to "owner-employees," a term defined in Code section 401(c)(3) to include employees who own the entire interest in an unincorporated trade or business or more than 10 percent of a partnership. It is thus patently clear that Title II of ERISA permits "working owners" to receive the tax benefits that flow from participation as "participants" in pension plans that meet the qualification requirements of Code section 401(a).

Title IV of ERISA (the termination insurance provisions) also expressly includes "working owners" among the "participants" who receive its protections. See ERISA section 4001(b)(1) ("an individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of [Code] section 401(c)(1) . . ."). Section 4021(b)(9) of ERISA excludes from coverage under Title IV only those

[5] Although we rely on certain provisions of Title II and Title IV in reaching the conclusions expressed in this opinion, nothing in this opinion should be construed as interpreting the provisions of those Titles that lie within the interpretive jurisdiction of the Department of the Treasury and the Pension Benefit Guaranty Corporation.

pension plans that are "established and maintained exclusively for substantial owners," i.e., sole proprietors and more than ten-percent owners of partnerships and corporations. See ERISA section 4022(b)(5)(A) (defining "substantial owner"). Title IV limits the amount of benefits that the PBGC guarantees to "substantial owners" who participate in single employer plans, but nonetheless provides a basic guarantee of such owners' pension benefits. Such a guarantee would be meaningless if Title I did not permit such owners to be participants in ERISA-covered pension plans.

In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner-employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)[6]

[6] In Darden, the United States Supreme Court held that the definition of "employee" provided in section 3(6) of Title I did not include an individual who was an independent contractor to the

(Continued on following page)

Therefore, it is the view of the Department that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan, including the NEBF, from extending plan coverage to "working owners," as described in your submission, where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provisions of Title I.[7]

ERISA's fiduciary standards, however, require compliance with any other applicable federal law. Pursuant to ERISA section 514(d), nothing in Title I of ERISA shall be

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employer that established and maintained the plan. In reaching this conclusion, the Court first sought to determine whether ERISA contained any provision "either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id. at 323.* Finding no guidance in the statute itself, the Court concluded that, "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *503 U.S. at 322.* We follow here the Court's analysis in Darden, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat "working owners" as "participants."

[7] In its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "an individual and his or her spouse . . . with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3(3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation.

construed to alter, amend, modify, invalidate, impair, or supersede any federal law or any rule or regulation issued pursuant to such federal law. Such federal laws include any requirements applicable to multiemployer benefit plans under the Labor Management Relations Act (LMRA). Several federal courts interpreting the LMRA have upheld decisions by plan trustees to exclude owner-employees on the ground that their inclusion would violate the LMRA. See, e.g., *Todd v. Benal Concrete Const. Co., Inc., 710 F.2d 581* (9th Cir. 1983); *Aitken v. GCU-Employer Retirement Fund, 604 F.2d 1261* (9th Cir. 1979). The Department is not authorized to issue opinions regarding the LMRA. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" should seek legal advice regarding the propriety of the participation of "working owners" in such plan under the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Susan G. Lahne
Acting Chief
Division of Fiduciary Interpretations
Office of Regulations and Interpretations

Department of Labor.

Pension & Welfare Benefit Programs.

OPINION 81-54 A

June 22, 1981

REQUEST BY:

Mr. Richard M. Cosgrove
Executive Director
Lansing Mechanical Contractors Association
421 Seymour Avenue
Lansing, Michigan 48933

OPINION:

This is in response to your letter of February 15, 1980 regarding the Arthur J. Faggion Scholarship Fund (the Fund) requesting an advisory opinion from the Department of Labor (the Department) with respect to certain reporting and disclosure requirements under the Employee Retirement Income Security Act of 1974 (ERISA) for the Fund, which you recognize as an employee welfare benefit plan under ERISA. Specifically, you request that the department provide an advisory opinion as to (1) which individuals should be counted as participants in the Fund, and (2) whether the Fund is exempt from certain reporting and disclosure requirements under ERISA.

Your request and the materials submitted therewith include the following facts and representations:

1. The Fund is a scholarship trust established by a trust agreement between the Plumbers and Pipefitters Union #338 (the Union), its members, and the Lansing Mechanical Contractors Association (the Association). The purpose of the Fund is to provide scholarship benefits to

children of the dues-paying members of the Union and certain employers or shareholder-employees of employers.

2. The Fund receives funds from employer contributions pursuant to a collectively bargained union contract at the rate of 4 cents per hour worked for each Union member.

3. Scholarship awards may be granted only to the children of eligible individuals. Eligibility in the Fund is limited to an individual who is:

(a) a dues paying Union member who was not delinquent in paying dues as of December 31 of the prior year and had 3,000 hours of work under the collectively bargained agreement during the three years ending with that date,

(b) an employer or shareholder-employee of the employer on December 31 of the prior year who paid wages to a member or members of the Union under the collectively bargained agreement for at least 3,000 hours during the three years ending with that date, or

(c) a deceased individual who at the time of death met the requirements of (a) or (b).

4. The duties of the Fund trustees include:

(a) designating a bank or trust company as depository of the monies of the Fund and providing for the withdrawal of such monies;

(b) receiving and depositing in the name of the Fund such monies as are received pursuant to the collective bargaining agreement;

(c) paying out such monies to the designated recipients of the awards;

(d) paying the reasonable costs and expenses of maintaining and administering the Fund;

(e) investing any unused portion of the monies as it deems appropriate in obligations of the federal and state governments and in obligations of banks, savings and loan and building and loan institutions.

With respect to your inquiry concerning which individuals should be counted as participants in the Fund, section 3(7) of ERISA defines a participant to be "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or member of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(8) of ERISA defines a beneficiary to be "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

In accordance with the statements you submitted and consistent with the language of section 3(8) of ERISA, we believe those children of eligible individuals who are or may become entitled to a benefit (scholarship) by the terms of the Fund would be beneficiaries. We further believe that those individuals meeting the elibigibility criteria of the Fund would be participants in accordance with section 3(7) of ERISA.

With respect to your inquiry concerning whether the Fund is exempt from certain reporting and disclosure

requirements of contain a limited reporting exemption for certain dues financed welfare benefit plans as noted in your letter. However, this regulation applies "only to welfare benefit plans maintained by an employee organization ... paid for out of the employee organization's assets, which are derived wholly or partly from membership dues ..."

Since scholarship benefits, as provided by the Fund, are funded by regular contributions and are held in trust, we believe the limited exemption provided by section 2520.104-26 does not apply. Therefore we are of the opinion that the Fund, as currently administered, would not be exempt from complying with the Department's regulations regarding the summary plan description, summary of material modifications, annual report and summary annual report. However, if the Fund has fewer than 100 participants it may be eligible for the waiver of certain requirements provided by section 2520.104-46 of the annual reporting regulations (copy enclosed). This section provides that the plan administrator of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year is not required to –

(1) Engage an independent qualified public accountant to conduct an examination of the financial statements of the plan;

(2) Include within the annual report the financial statements and schedules prescribed in section 103(b) of the Act and §§ 2520.103-1, 2520.103-2, and 2520.103-10; and

(3) Include within the annual report a report of an independent qualified public accountant as prescribed in section 103(a)(3)(A) of the Act and § 2520.103-1.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs

Department of Labor.

Pension & Welfare Benefit Programs.

OPINION 79-8 A

January 30, 1979

REQUEST BY:

Mr. Robert W. Gilbert
Suite 305
400 South Beverly Drive
Beverly Hills, California 90212

Mr. Joseph M. McLaughlin
McLaughlin and Irvin
Suite 300
800 West Sixth Street
Los Angeles, California 90017

OPINION:

This is in reply to your letter of November 9, 1978, requesting an advisory opinion concerning the eligibility of Mrs. Joan Adams for participation in the Southern California Retail Clerk Unions and Food Employers Council Joint Pension Trust Fund (the Fund). Specifically, you ask whether Mrs. Adams must be automatically precluded from participating in the Fund by section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Fund is a multiemployer fund jointly managed by employer and employee representatives and is subject to title I of ERISA. You also represent that Mrs. Adams, who participated in the Fund from September, 1971, until May, 1977, is the wife of the owner of a 12 1/2 percent partnership interest in Vicente Foods, where Mrs. Adams is employed and which contributes to

the Fund on her behalf. You assert that Mr. Adams owns his partnership interest as separate property, not as community property.

The Department of Labor is of the opinion that Mrs. Adams is not precluded from participating in the Fund by section 403(c)(1). Section 403(c)(1) of ERISA provides generally that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The term "participant," as it is used in ERISA section 403(c)(1), is defined in ERISA section 3(7) to include "any employee . . . of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." ERISA section 3(6) defines the term "employee" as "any individual employed by an employer." Regulation section 2510.3-3, which interprets section 3(3) of ERISA for purposes of title I thereof, provides, in part, that "[f]or purposes of this [regulation,] . . . a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." However, that regulation is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

This letter is not intended to interpret or express any opinion concerning the Labor Management Relations Act to which you referred in your inquiry or concerning any other statute (other than ERISA title I and regulations pursuant thereto).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

AUG 11 2003

No. 02-458

In the Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN, AND RAYMOND B. YATES, TRUSTEE, PETITIONERS

v.

WILLIAM T. HENDON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the working owner of a business (here, the sole shareholder of a corporate employer) is precluded from being a "participant" under Section 3(7) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(7), in an ERISA plan.

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In the Supreme Court of the United States

No. 02-458

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN, AND RAYMOND B. YATES, TRUSTEE, PETITIONERS

v.

WILLIAM T. HENDON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a working owner (such as a shareholder, sole proprietor, or partner who renders services to a business) may be a participant in a plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Three agencies of the United States—the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation (PBGC)—share responsibility for administering and enforcing ERISA. The Secretary of Labor is primarily responsible for interpretation and enforcement of Title I of ERISA, 29 U.S.C. 1001 *et seq.* The Secretary of the Treasury is responsible for interpretation and enforcement of Title II of ERISA, 88 Stat. 898 (codified in various provisions of Title 26 of the United States Code). And the PBGC

is responsible for interpreting and enforcing the provisions of Title IV of ERISA, 29 U.S.C. 1301 *et seq.* The question presented concerns the definition and coverage provisions of Title I of ERISA, but the question of who may participate in an ERISA plan arises under each title of ERISA. The United States therefore has a substantial interest in the question presented. The United States filed an amicus brief at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). Title I of ERISA (29 U.S.C. 1001 *et seq.*) contains provisions, administered and enforced primarily by the Department of Labor, that govern reporting and disclosure, fiduciary responsibility, and plan administration and enforcement, as well as substantive requirements for pension and group health plans. Title II, 88 Stat. 898 (codified in various provisions of Title 26 of the United States Code), contains amendments to Internal Revenue Code provisions establishing the conditions that employee benefit plans must meet to qualify for favorable tax treatment. Title III (29 U.S.C. 1201 *et seq.*) contains miscellaneous administrative provisions, and Title IV (29 U.S.C. 1301 *et seq.*) establishes the PBGC to guarantee benefits to participants in and beneficiaries of defined benefit pension plans.

Title I defines a "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible

to receive any such benefit." 29 U.S.C. 1002(7). Title I defines an "employee" as "any individual employed by an employer." 29 U.S.C. 1002(6). Title I defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8). Participants and beneficiaries are authorized to bring civil actions to enforce their rights under ERISA and ERISA plans. 29 U.S.C. 1132(a)(1)(B), (2), and (3).[1]

2. Dr. Raymond B. Yates was a practicing physician and the sole shareholder and president of a professional corporation known as Raymond B. Yates, M.D., P.C. Pet. App. 2a, 10a. The corporation maintained the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the plan), of which Dr. Yates was the plan administrator and trustee. *Id.* at 2a-3a. As of June 30, 1996, four persons were designated as plan participants, including Dr. Yates. *Id.* at 3a. From its inception, the plan always had at least one participant other than Dr. Yates and his wife. See *id.* at 10a.

The plan qualified for favorable tax treatment under Section 401 of the Internal Revenue Code (the Code), 26 U.S.C. 401, as amended by ERISA, see Pet. App. 2a-3a, and contained an anti-alienation provision as required both by the Code, 26 U.S.C. 401(a)(13), and by Title I of ERISA, 29 U.S.C. 1056(d). Pet. App. 4a. That provision, entitled "Spendthrift Clause," provided in relevant part:

> Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily.

---

[1] Plan fiduciaries and the Secretary of Labor are also authorized to bring civil actions to enforce Title I of ERISA. See 29 U.S.C. 1132(a)(2), (3), and (5).

Id. at 11a. Article 12 of the plan, which authorized participant loans, also imposed various requirements specified by Title I of ERISA and the Code, including that the loan be adequately secured by the participant's accrued benefit, that the loan bear a reasonable rate of interest, and that the participant make repayments at least quarterly over a period not to exceed five years. C.A. App. 235-236; see 29 U.S.C. 1056(d)(2), 1108(b)(1); 26 U.S.C. 72(p)(2)(B) and (C), 401(a)(13)(A), 4975(d)(1).

In December 1989, Dr. Yates borrowed $20,000 from the plan at 11% interest and pledged as security his vested account balance in the plan. Pet. App. 3a, 10a-11a. The initial term of the loan was five years, but the loan was extended for another five years in June 1992. *Id.* at 3a. Although the loan agreement required monthly payments of $433.85, Dr. Yates made no payments until November 1996, when he repaid the entire principal and interest due in two payments that totaled $50,467.46. *Id.* at 3a, 11a. On December 2, 1996, three weeks after the repayment, Dr. Yates' creditors filed an involuntary bankruptcy petition against him under Chapter 7 of the Bankruptcy Code (11 U.S.C. 701 *et seq.*). Pet. App. 3a; see 11 U.S.C. 303.

3. Several months later, respondent William T. Hendon, the trustee in bankruptcy, commenced this adversary proceeding under 11 U.S.C. 547(b) and 550 against the plan and Dr. Yates as plan trustee (petitioners herein) in the United States Bankruptcy Court for the Eastern District of Tennessee. Respondent asked the court to set aside the loan repayment as a preferential transfer, avoidable under Section 547, and to order the plan to pay respondent the money that Dr. Yates had repaid the plan. Pet. App. 3a. Both parties filed motions for summary judgment, and the court granted summary judgment to respondent. *Id.* at 36a-50a.

The bankruptcy court first held that the loan repayment met the criteria for a preferential transfer under Section

547(b). Pet. App. 41a-42a. The court then considered and rejected petitioners' argument that respondent could not recover the preferential transfer because the plan contained an anti-alienation provision enforceable under ERISA. *Id.* at 43a-44a, 46a-47a.

Section 541(c)(2) of the Bankruptcy Code provides that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under [the Bankruptcy Code]." 11 U.S.C. 541(c)(2). In *Patterson* v. *Shumate*, 504 U.S. 753 (1992), this Court held that the anti-alienation provision of ERISA is "applicable nonbankruptcy law" within the meaning of Section 541(c)(2) and that a debtor's interest in an ERISA plan is therefore excluded from the debtor's bankruptcy estate. 504 U.S. at 757-765. Based on *Patterson* and Section 541(c)(2), petitioners argued that Dr. Yates' interest in the plan, including the amount of his loan repayment, was excluded from his bankruptcy estate.

The bankruptcy court rejected that argument. The court reasoned that Dr. Yates, as the "self-employed owner of the professional corporation that sponsors the pension plan," "cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest" in the plan. Pet. App. 43a-44a (citing *SEC* v. *Johnston*, 143 F.3d 260 (6th Cir. 1998); *Fugarino* v. *Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), cert. denied, 507 U.S. 966 (1993); and 29 C.F.R. 2510.3-3(c)(1)). The court therefore concluded that Dr. Yates' interest in the plan was not protected by ERISA and not excluded from his bankruptcy estate under Section 541(c)(2). See Pet. App. 46a.[2]

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[2] Because the bankruptcy court concluded that Dr. Yates' interest in the plan was not excluded from his bankruptcy estate, the court found it

4. The United States District Court for the Eastern District of Tennessee affirmed the judgment of the bankruptcy court. Pet. App. 9a-35a. The district court considered itself bound by prior Sixth Circuit decisions that had held that neither a sole proprietor, *Fugarino*, *supra*, nor a sole shareholder of a corporate employer, *Agrawal* v. *Paul Revere Life Insurance Co.*, 205 F.3d 297 (2000), may be a participant in an ERISA plan. Pet. App. 16a-21a.

Those decisions relied in significant part on a Department of Labor regulation, 29 C.F.R. 2510.3-3(c)(1), which the decisions interpreted to exclude sole owners and their spouses from the definition of "employee" for purposes of Title I of ERISA, and therefore also from the definition of a plan "participant." See 29 U.S.C. 1002(6) (defining "employee" as "any individual employed by an employer"); 29 U.S.C. 1002(7) (defining "participant" as an "employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan"). The district court acknowledged that the regulation is better read to address only which plans are covered by Title I of ERISA, and to permit sole owners to participate in ERISA plans that also include other employees, as other circuits have held. Pet. App. 19a (citing *Madonia* v. *Blue Cross & Blue Shield*, 11 F.3d 444 (4th Cir. 1993), cert. denied, 511 U.S. 1019 (1994), and *Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287 (5th Cir. 1999)). The court concluded, however, that it was bound by Sixth Circuit precedent, under which Dr. Yates "was not qualified to participate in an ERISA protected plan." *Id.* at 20a. Because Dr. Yates could not be a participant in an ERISA plan, the court concluded that none

unnecessary to decide whether a bankruptcy trustee may avoid and recover a preferential transfer from property that is excluded from the estate. Pet. App. 47a.

of his interest in the plan, including the amount he returned in the loan repayments, was protected by ERISA. *Ibid.*[3]

5. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. Pet. App. 1a-8a. The court of appeals reasoned that the plan's anti-alienation clause is not "enforceable under applicable nonbankruptcy law" within the meaning of 11 U.S.C. 541(c)(2) because it "is not enforceable by Dr. Yates under ERISA." Pet. App. 6a.

The court of appeals noted that ERISA provides that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." Pet. App. 5a (quoting 29 U.S.C. 1132(a)(3)(B)(ii)). But the court reasoned that, under *Fugarino* and *Agrawal*, Dr. Yates, as a sole shareholder, "cannot qualify as a 'participant or beneficiary' in an ERISA pension plan." *Ibid.* Concluding that those circuit precedents dictate that Dr. Yates "does not have standing under the ERISA enforcement mechanisms," *ibid.* (quoting *Agrawal*, 205 F.3d at 302), the court held that "the spendthrift clause in the * * * plan is not enforceable by Dr. Yates under ERISA." *Id.* at 6a.

The full court subsequently denied a petition for rehearing en banc. Pet. App. 51a.

SUMMARY OF ARGUMENT

Many shareholders, sole proprietors, and partners render services to the businesses they own in exchange for remuneration. This case presents the question whether those working owners may be participants in plans covered by ERISA, 29 U.S.C. 1001 *et seq.* The analytic framework for answering that question is described in this Court's decision

[3] The district court, like the bankruptcy court, therefore did not decide whether, "had Dr. Yates been eligible to participate in the Plan under ERISA, the Chapter 7 Trustee might have been prohibited from avoiding Dr. Yates's loan repayments to the Plan." Pet. App. 22a.

in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992), which addressed ERISA coverage of independent contractors. Because the statutory definitions of "employee" and "participant" are unhelpful, the Court first looks to other provisions of ERISA for specific guidance on the coverage question. If that quest also fails, the Court looks to common-law principles (as it did in *Darden*), unless doing so would thwart the congressional design or lead to irrational results.

In the case of working owners (unlike independent contractors), there is no cause to resort to the common law because Title I of ERISA and related provisions of law clearly indicate that Congress intended to permit working owners to be plan participants. Title I itself contains several partial exemptions from ERISA requirements for plans in which working owners participate. Those exemptions would be largely unnecessary if working owners were categorically excluded from participation in ERISA plans. Title I also cross-references a number of Internal Revenue Code provisions that plainly contemplate the participation of working owners in tax-qualified pension plans. Title IV of ERISA likewise contains a number of provisions that assume working owners may be plan participants. Thus, all of ERISA reflects the basic premise that working owners may participate in ERISA plans. That is not surprising, because ERISA was enacted against the backdrop of Internal Revenue Code provisions that have long allowed corporate shareholders, partners, and sole proprietors to participate in tax-qualified pension plans.

Allowing working owners to be participants in benefit plans covered by ERISA furthers ERISA's purposes of promoting employee benefit plans and protecting the interests of plan participants and their beneficiaries. Working owners who participate in plans on an equal basis with other employees may benefit from the fiduciary protections provided by Title I of ERISA, as well as the tax preferences provided

by Title II, and the termination insurance provided by Title IV. At the same time, allowing working owners to be plan participants encourages them to create plans that also provide benefits to other employees and promotes economies of scale in plan administration and investments.

Excluding working owners from the definition of plan "participant" would lead to irrational consequences in the administration of employee benefit plans. First, it would create different and unequal rights and remedies for working owners and other employees who are covered by the same plan, such as an insured group health plan or a multi-employer pension plan. Second, splitting a plan into ERISA and non-ERISA components would be administratively unworkable under both the Internal Revenue Code and Title I of ERISA. For example, a pension plan must be either tax-qualified or not; it cannot be tax-qualified in part. Similarly, many fiduciary duties run to the plan as a whole. In a traditional defined benefit plan, for instance, such duties could not attach only to plan assets earmarked for certain employees because plan assets are not segregated into individual accounts.

Treating working owners as ERISA "beneficiaries" rather than "participants," as some courts have done, does not solve those problems. The "beneficiary" approach has no logical stopping point, because it would allow a plan to cover anyone it chooses, including independent contractors excluded by *Darden*. The "beneficiary" approach also fails to resolve participation questions for pension plans which, unlike welfare plans, tie coverage directly to service as an employee. In contrast, the anomalous results are avoided if ERISA is read to allow working owners to be participants in ERISA plans.

Based on the foregoing considerations, the Department of Labor (DOL), which is responsible for interpreting the definition and coverage provisions of Title I of ERISA, has

issued an advisory opinion interpreting ERISA to permit working owners to be participants in ERISA plans. A DOL regulation (which the court below misconstrued) says nothing to the contrary. Nor does permitting participation by working owners run afoul of the provision of ERISA that prevents plan assets from inuring to the benefit of employers. That provision expressly permits the payment of benefits to plan participants and does not address who is eligible to be a plan participant.

ARGUMENT

A WORKING OWNER MAY BE A "PARTICIPANT" IN AN ERISA PLAN

Millions of Americans not only own businesses but also work for the businesses that they own.[4] Hundreds of thousands of those working owners are covered, along with the other employees of their businesses, by pension or other benefit plans.[5] The question presented by this case is

[4] Over 10 million workers are self-employed in unincorporated businesses. Bureau of Labor Statistics, U.S. Dep't of Labor, 50 *Employment & Earnings* No. 5, Tab. A7, at 16 (May 2003). Approximately four million additional workers are self-employed as wage and salary workers in incorporated businesses. Bureau of the Census, U.S. Dep't of Commerce, *Current Population Survey, February 2001: Contingent Work Supplement* (unpublished data file tabulated by U.S. Dep't of Labor).

[5] Labor Department statistics indicate that, in 1998, there were 313,370 pension plans covered by Title I of ERISA with two to nine participants, and 298,422 covered plans with 10 to 99 participants. Pension & Welfare Benefits Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin, Abstract of 1998 Form 5500 Annual Reports*, No. 11, Tab. B1, at 13 (Winter 2001-2002). Although those statistics do not indicate how many participants are working owners, the Department believes, based on its experience, that, on average, each of those plans includes at least one working owner. That estimate is consistent with household survey data collected by the Census Bureau, which indicate that more than one million self-employed workers were participants in some kind of pension plan in 1998 (although not all those plans are covered by Title I of ERISA). Bureau of the Census, U.S. Dep't of Commerce, *Survey of Income and Program Participation, 1996 Panel, Wave 7, Pension Benefits Module* (unpublished data file tabulated by U.S. Dep't of Labor).

whether those working owners are "participant[s]" in their benefit plans within the meaning of Title I of ERISA, 29 U.S.C. 1002(7), and thus enjoy the protections that ERISA provides and are governed by the rights and remedies that it specifies. As the Department of Labor has explained in an advisory opinion letter, a working owner may be a "participant" in an ERISA plan. See Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Advisory Opinion No. 99-04A (Feb. 4, 1999) (*reprinted in* App., *infra*, 1a-9a). That conclusion is supported by this Court's precedent, the text of ERISA, and the historical context in which ERISA was enacted, and it furthers ERISA's underlying purposes.

A. Under *Nationwide Mutual Insurance Co.* v. *Darden*, Whether A Working Owner May Be A Participant In An ERISA Plan Turns On The Text Of ERISA

This Court's decision in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992), sets forth the appropriate framework for analyzing whether a working owner can be a "participant" in an ERISA plan. In *Darden*, the Court addressed whether an insurance salesman was a "participant," within the meaning of Section 3(7) of ERISA, 29 U.S.C. 1002(7), in a retirement plan sponsored by the insurance company whose policies the agent sold. The Court explained that an individual generally can qualify as an ERISA plan "participant" only if the individual is an "employee," which ERISA defines as "any individual employed by an employer." 503 U.S. at 320-321 (quoting 29 U.S.C. 1002(6) and (7)). The Court found the definition of "employee" to be "completely circular," so it looked elsewhere to determine whether the salesman was an "employee" or was instead an independent contractor. *Id.* at 323. Because the Court could not find "any provision [in ERISA] either giving specific

guidance" on how to differentiate between an employee and an independent contractor or suggesting that adopting the traditional common-law test to distinguish between the two categories "would thwart the congressional design or lead to absurd results," the Court adopted the common-law test. *Ibid.*

The precise question in *Darden* was different from the question presented here. The question in *Darden* was whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" in an ERISA plan because he is an independent contractor. Here, the question is whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" because he is the business's owner. Nonetheless, *Darden* sets forth the appropriate mode of analysis for resolving the question presented here.

As the Court explained in *Darden*, ERISA's definition of "employee," which is in turn part of the definition of "participant," is "completely circular." 503 U.S. at 323. Thus, just as the definitions of "employee" and "participant" were not helpful in resolving the question in *Darden*, they are not helpful in resolving the question whether a working owner may be an ERISA plan participant. The first step in resolving that question, under *Darden*, is to determine whether any other provisions of ERISA furnish guidance. See *ibid.* If other statutory provisions also provided no guidance, then the second step would be to use common-law principles to resolve the question, provided their application would not thwart the congressional design or lead to irrational consequences. *Ibid.*

The Court recently followed that mode of analysis in *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 123 S. Ct. 1673 (2003), which presented the question whether a working owner (there, a major shareholder of a professional

corporation) was an employee within the meaning of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* The text of the ADA provided no guidance on the coverage of working owners. See 123 S. Ct. at 1677. Accordingly, the Court endorsed the test developed by the Equal Employment Opportunity Commission (EEOC) for resolving the question. That test, which was drawn from common-law principles, focused on the extent of the corporation's control over the shareholder. *Id.* at 1678-1681.[6]

In this case, unlike in *Clackamas*, there is no need to proceed to the second step of the *Darden* analysis and to develop a test based on common-law distinctions between master and servant. The question is resolved at the first step of the analysis because, unlike the ADA, ERISA is not silent on the coverage of working owners. As explained below, the text of ERISA, and the longstanding Internal Reve-

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[6] The EEOC control test does not precisely mirror the common law; rather, it looks to the common law only as "helpful guidance." *Clackamas*, 123 S. Ct. at 1679; Tr. of Oral Arg. at 17-18, *Clackamas*, *supra* (No. 01-1435). The EEOC test also reflects the ADA's purpose of eliminating discrimination while not unnecessarily burdening small businesses. See Br. for United States et al. as Amicus Curiae at 10-11, *Clackamas*, *supra* (No. 01-1435); 123 S. Ct. at 1678-1679 & n.6. As explained in the text following this note, resort to common-law principles (even for guidance) is not appropriate in resolving whether working owners may be participants in ERISA plans because the text of ERISA itself resolves that question. Even if the Court were to consult the common law, however, it should also consider the purposes of ERISA, just as the EEOC and the Court considered the purposes of the ADA in *Clackamas*. Because the purposes of ERISA differ from those underlying the ADA and other anti-discrimination statutes, a test that focuses on the extent of the business's control over the working owner is not appropriate to resolve the ERISA coverage question. Although a controlling shareholder of a corporation may not need statutory protection from discrimination (and indeed may be part of the management that is responsible for such discrimination), there are good reasons to permit controlling shareholders to participate along with other employees in benefit plans protected by ERISA. See pp. 20-25, *infra*.

nue Code provisions that provided the backdrop for its enactment, establish that Congress intended that working owners of all types may be participants in ERISA plans.[7]

B. The Text Of ERISA Demonstrates That A Working Owner May Be A Participant In An ERISA Plan

1. A variety of provisions in ERISA make clear that working owners may be "participants" in employee benefit plans covered by ERISA. Most notably, several provisions of Title I specifically address working owners by providing partial exemptions from certain ERISA requirements for plans in which working owners are participants. Those partial exemptions would be largely unnecessary if working owners were categorically excluded from participation.

For example, Title I of ERISA imposes a variety of "fiduciary responsibility" requirements, which are designed to ensure that ERISA plans will be managed responsibly and for the benefit of plan participants and their beneficiaries. See 29 U.S.C. 1101 *et seq.* There are exemptions from the fiduciary responsibility requirements for certain plans involving working owners. In particular, a plan is exempt from the fiduciary responsibility requirements if it "is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. 1101(a)(1). Such plans are quite likely to include working owners as participants, because a "highly compensated employee" is defined, by Internal Revenue Code

[7] Consistent with that understanding, the parties before the Court in *Clackamas* agreed that shareholder-employees are "employees" and thus "participants" under ERISA. See Tr. of Oral Arg. at 6-7, *Clackamas*, *supra* (No. 01-1435) (concession by counsel for petitioner, who argued that shareholder-employees are not employees under the ADA, that they are employees under ERISA). The dissent in *Clackamas* noted the point, see 123 S. Ct. at 1682 (Ginsburg, J., dissenting), although the majority did not refer to it.

(Code) provisions relating to ERISA plans, as "any employee" who owns more than five percent of the stock of a corporate employer or more than a five percent interest in a non-corporate employer. 26 U.S.C. 414(q)(1)(A) and (2), 416(i)(1)(B)(i). Also exempt from the fiduciary responsibility requirements is "any agreement described in section 736 of [the Code], which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest." 29 U.S.C. 1101(a)(2). Such arrangements necessarily involve plans in which partners are participants. See 26 U.S.C. 736. The two exemptions from the fiduciary responsibility requirements—particularly the latter—thus presuppose that working owners may participate in plans covered by Title I of ERISA.

There are also more limited exemptions from particular fiduciary responsibility requirements for certain plans in which working owners are "participants." For example, all assets in ERISA-covered plans must generally be held in trust. 29 U.S.C. 1103(a). But 29 U.S.C. 1103(b)(3)(A) exempts from that requirement, subject to certain qualifications, a plan "some or all of the *participants* of which are *employees* described in section 401(c)(1) of [the Code]" (emphasis added). Section 401(c)(1) provides that the term "employee," for purposes of Section 401 (which prescribes the criteria under which pension plans qualify for favorable tax treatment), includes a "self-employed individual." 26 U.S.C. 401(c)(1)(A). That term is in turn defined as a person with "earned income" from "a trade or business in which personal services of the taxpayer are a material income-producing factor," a definition that includes working sole proprietors and partners. See 26 U.S.C. 401(c)(1)(B) and (2)(A)(i), 1402(a) and (c). The exemption from the trust requirement provided by Section 1103(b)(3)(A) would be unnecessary if a working partner or sole proprietor could not be a "participant" in an ERISA plan.

Exemptions from ERISA's prohibited transaction provisions also indicate that working owners may be plan participants. ERISA generally prohibits transactions between a plan and a party in interest, 29 U.S.C. 1106, but contains an exemption for loans to plan participants that meet certain conditions. One condition is that the loans not discriminate in favor of "highly compensated employees (within the meaning of section 414(q) of [the Code])." See 29 U.S.C. 1108(b)(1)(B). As noted above, "highly compensated employees" are frequently working owners, including shareholder-employees. Furthermore, 29 U.S.C. 1108(d)(1) excludes from the participant loan exemption an "owner-employee" as defined in Section 401(c)(3) of the Internal Revenue Code. An "owner-employee" means an employee who is either a sole proprietor or a partner who owns more than 10% of the partnership. 26 U.S.C. 401(c)(3). Thus, the participant loan provisions assume that shareholders, sole proprietors, and partners may be participants in plans covered by Title I of ERISA.

2. That reading of Title I of ERISA is reinforced by related statutory provisions. As the above discussion illustrates, various provisions of the Internal Revenue Code, cross-referenced in Title I of ERISA, make clear that working owners may be participants in employee benefit plans that qualify for favorable tax treatment. A pension plan may qualify for favorable tax treatment only if it is "for the exclusive benefit of * * * employees." 26 U.S.C. 401(a). The Code expressly provides that "employees" eligible to receive benefits under tax-qualified pension plans include "self-employed individuals," such as "owner-employees," 26 U.S.C. 401(c), a group which, as described above, encompasses working sole proprietors and partners. Internal Revenue Service (IRS) regulations also expressly provide that the "employees" that may be benefitted by tax-qualified plans include "officers and shareholders." 26 C.F.R. 1.401-

1(b)(3). And an IRS Revenue Ruling, in turn, makes clear that a participant shareholder may be a "principal or sole shareholder." Rev. Rul. 72-4, 1972-1 C.B. 105. The Code assumes that the corporation is the employer of a working shareholder and specifically provides that a sole proprietor "shall be treated as his own employer," and "[a] partnership shall be treated as the employer of each partner" who has earned income from the partnership. 26 U.S.C. 401(c)(4).

Similarly, the plan termination insurance provisions in Title IV of ERISA expressly contemplate participation by working owners in plans covered by its provisions. Title IV generally applies to any employee pension benefit plan, as defined in 29 U.S.C. 1002(2), that is not an individual account plan and that meets specified requirements in the Internal Revenue Code, including qualification under Section 401(a). 29 U.S.C. 1321. Title IV excepts from its coverage any plan "established and maintained exclusively for substantial owners," 29 U.S.C. 1321(b)(9), which include sole proprietors, and partners and shareholders with an ownership interest of more than 10%, 29 U.S.C. 1322(b)(5)(A). Plans in which substantial owners participate along with other employees are, however, generally covered by Title IV. See 29 U.S.C. 1322(b)(5)(B) (limiting amount of benefits that PBGC will guarantee to substantial owners who participate in single-employer plans).[8]

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[8] Title IV also excepts from its coverage plans with 25 or fewer active participants that are "established and maintained by a professional service employer." 29 U.S.C. 1321(b)(13). A "professional service employer" includes "any proprietorship, partnership, corporation, or other association or organization * * * owned or controlled by professional[s] * * * the principal business of which is the performance of professional services." 29 U.S.C. 1321(c)(2)(A). A "professional service employer" thus includes a professional corporation of the type involved in this case. Inclusion of the express exception for certain plans established by professional service corporations demonstrates that such plans, in which

Another indication that working owners may be participants in plans covered by Title IV of ERISA is that Title IV, like the Internal Revenue Code, contains a provision identifying the "employer" of sole proprietors and partners. See 29 U.S.C. 1301(b)(1) (providing that a sole proprietor "is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1)" of the Code). That provision (like the similar Code provision) makes clear that, under ERISA, a working owner may properly have a dual status, in which he is both an employee entitled to participate in an ERISA plan and the employer (or owner or member of the employer) who establishes the plan. Accordingly, where a working owner becomes a member of an ERISA plan on a basis equal to other employees, he has assumed the status of those employees for purposes of ERISA and is properly treated as a participant in the plan. In sum, ERISA reveals a clear congressional design, evident throughout all of its substantive titles, that working owners may be participants in ERISA-covered employee benefit plans.[9]

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shareholder-employees who perform professional services are likely to be participants, are generally covered by Title IV.

[9] Although all three of ERISA's substantive titles contemplate that working owners may be participants in covered plans, a particular plan may (by statute or by regulation) be covered by one title of ERISA and not another, and whether a plan is covered under a particular title may depend on the extent to which working owners are participants. For example, if Dr. Yates owned a small corporation that employed only him and his spouse, a pension plan covering them would be excluded from Title I by 29 C.F.R. 2510.3-3, tax-qualified under 26 U.S.C. 401, as amended by Title II, and excluded from Title IV under 29 U.S.C. 1321(b)(9) and (13). In contrast, if Dr. Yates owned a larger corporation with 30 employees, all of whom were participants in a defined benefit pension plan in which he also participated, the plan would be covered by all three titles of ERISA. But those differences concern whether a particular plan is covered under a particular title; they do not concern whether working owners may be participants in covered plans. The different titles give a uniform and affirmative answer to the latter question.

C. ERISA Was Enacted Against The Backdrop Of Internal Revenue Code Provisions That Have Long Permitted Working Owners To Participate In Tax-Qualified Employee Benefit Plans

The historical context in which Congress enacted ERISA reinforces the textual provisions demonstrating that working owners are eligible to participate in ERISA plans. ERISA was not the first federal legislation to address employee benefit plans. Tax laws concerning such plans had been in place for decades before ERISA was enacted. In enacting ERISA, Congress sought to integrate the new legislation with those existing tax provisions. Significantly, the tax laws concerning employee benefit plans that formed the backdrop for ERISA's enactment had long permitted working owners to participate in plans qualifying for favorable tax treatment.

Shareholders who work for the corporations in which they own stock have been treated as "employees" eligible to participate in tax-qualified pension plans since 1942. Under the Revenue Act of 1942, a pension trust was tax-exempt if, among other things, "the contributions or benefits provided under the plan [did] not discriminate in favor of *employees who [were]* officers, *shareholders*, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." Revenue Act of 1942, ch. 619, § 162, 56 Stat. 862 (formerly codified at 26 U.S.C. 165(a)(4) (1946)) (emphasis added). See S. Rep. No. 992, 87th Cong., 1st Sess. 8-9 (1961).

In 1962, Congress enacted the Self-Employed Individuals Tax Retirement Act, Pub. L. No. 87-792, 76 Stat. 809, authorizing the creation of tax-favored "H.R. 10" or "Keogh" plans for partners and sole proprietors. The Senate Report

accompanying the legislation explained that Congress sought to give "self-employed persons access to retirement plans on a reasonably similar basis to that accorded corporate stockholder employees." S. Rep. No. 992, *supra*, at 8. Among other things, the 1962 Act added the current provisions in 26 U.S.C. 401(c) and (d), discussed earlier, which define the term "employee" to include persons with earned income from self-employment, and define the term "owner-employee" to include working sole proprietors and certain working partners. 76 Stat. 811-815.

Thus, by 1962, all three types of working owners were eligible to participate in tax-qualified retirement plans. When Congress enacted ERISA in 1974, it did not alter that basic principle. On the contrary, ERISA modified certain existing tax provisions to "grant[] self-employed people tax treatment with respect to retirement plans (H.R. 10 plans) which is more nearly comparable to that now accorded to corporate employees under qualified retirement plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 33 (1974). Moreover, as the many cross-references to the Internal Revenue Code in Title I of ERISA demonstrate, see pp. 14-16, *supra*, Congress sought to integrate the new statutory provisions with the existing tax provisions. The conclusion that working owners may be participants in plans covered by Title I—just as they may continue to participate in plans receiving favorable tax treatment under the Code provisions amended by Title II—accords with Congress's intent to create an integrated federal legislative scheme governing employee benefit plans.

D. Treating Working Owners As Eligible Participants Advances The Purposes Of ERISA

1. The purposes of ERISA are furthered by allowing working owners to enjoy the benefits of Title I of ERISA, as well as the tax benefits provided by the Internal Revenue

Code and the termination insurance provided by Title IV of ERISA. In enacting ERISA, Congress recognized that employee benefit plans affect the well-being and security of millions of individuals and play an important role in stabilizing employment and industrial relations. 29 U.S.C. 1001(a). Congress therefore sought to protect the interests of participants in employee benefit plans and their beneficiaries, 29 U.S.C. 1001(b) and (c), and, as explained in later amendments to ERISA, to promote the development of such plans, 29 U.S.C. 1001a, 1001b. According working owners "participant" status under ERISA not only allows the owners themselves to enjoy the full panoply of protections provided by ERISA, but also promotes and strengthens the benefit rights of other employees.

The opportunity to participate in a benefit plan with the firm's other employees sometimes encourages working owners to establish a plan for those employees in the first instance.[10] Once a plan is established, participation by working owners as well as other employees may serve to increase scrutiny of the plan's administration, reduce administrative costs, and provide economies of scale in plan administration and investments. The owner's ability to enforce ERISA may also benefit the plan as a whole—for example, if the owner brings an action against a plan investment manager or insurance company for breach of fiduciary duty to the plan. See 29 U.S.C. 1132(a)(2) and (3) (standing); 29

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[10] In 2000, 65% of full-time employees at establishments with 100 or more employees were covered by pension plans, but only 33% of full-time employees at smaller establishments had pension coverage. Bureau of Labor Statistics, U.S. Dep't of Labor, No. 02-389, *Employee Benefits in Private Industry, 2000* (July 16, 2002). A recent survey of companies with five to 100 employees indicates that one factor influencing their decision to establish a pension plan is "so key executives can save for retirement on a tax-deferred basis." Employee Benefit Research Institute, *The 2003 Small Employer Retirement Survey (SERS) Summary of Findings* (June 3, 2003) <www.ebri.org/sers/2003/03sersof.pdf>.

U.S.C. 1104, 1106 (fiduciary duties); 29 U.S.C. 1002(21) (definition of fiduciary).

2. Defining the term "participant" in Title I to exclude working owners would lead to irrational consequences in the administration of employee benefit plans, because individuals covered by a single benefit plan would have different rights and remedies. For example, in one frequently-litigated scenario, the working owner of a small business purchases health or disability insurance for himself and his employees, and later sues the insurer for denying the owner's personal benefit claim.[11] In those cases, the owner typically seeks remedies under state law; the insurer argues that ERISA preempts the state-law remedies because they "relate to" an ERISA plan, 29 U.S.C. 1144(a); and the owner counters that there is no preemption because he cannot be a participant in an ERISA plan. Courts, such as the Sixth Circuit, that adhere to the view that working owners cannot be ERISA participants have concluded that the owner retains state-law remedies, even though other employees are limited to what are sometimes narrower remedies under ERISA. See, *e.g.*, *Fugarino*, 969 F.2d at 186.

The conclusion of those courts that the owner retains state-law remedies follows from application of the general view of ERISA preemption currently held by most courts of appeals, which is that a dispute between persons who are not acting in an ERISA capacity does not "relate to" a plan within the meaning of 29 U.S.C. 1144(a). See, *e.g.*, *LeBlanc* v. *Cahill*, 153 F.3d 134, 147 (4th Cir. 1998); *Arizona State Carpenters Pension Trust Fund* v. *Citibank*, 125 F.3d 715, 723-724 (9th Cir. 1997); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enters.*, 793 F.2d 1456, 1467-1468 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). There is, however, a contrary argument that benefit claims by working owners do "relate to" an ERISA plan because they are based on an insurance contract or other document that is an ERISA plan because it also covers non-owner employees. But that approach would still result in different rights and remedies for individuals covered by a single plan. The owners would have no remedy at all—under either ERISA or state law—while non-owner employees would continue to have the remedies provided by ERISA.

[11] See, *e.g.*, *Gilbert* v. *Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001); *Agrawal*, *supra*; *Vega*, *supra*; *Wolk* v. *UNUM Life Ins. of Am.*, 186 F.3d 352 (3d Cir. 1999), cert. denied, 528 U.S. 1076 (2000); *Robinson* v. *Linomaz*, 58 F.3d 365 (8th Cir. 1995); *Peterson* v. *American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir.), cert. denied, 516 U.S. 942 (1995); *Madonia*, *supra*; *Fugarino*, *supra*.

The anomalous situation in which individuals covered by the same plan have different rights and remedies undermines two related purposes of ERISA: to "ensure[] that the administrative practices of a benefit plan will be governed by only a single set of regulations," *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987), and to "ensure[] similar treatment for all claims relating to employee benefit plans," *Madonia*, 11 F.3d at 450.

The same problem arises in situations, such as the one presented by this case, in which the owner seeks to be recognized as an ERISA participant to gain protections that the owner contends are provided by ERISA—here the protection against alienation of pension benefits. See, *e.g.*, *Kwatcher* v. *Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (sole shareholder suing for benefits from multi-employer plan to which he had previously contributed). In those contexts as well, the Sixth Circuit's rule would lead to the anomalous result that individuals covered by a single plan have different rights and remedies. Those anomalies would occur in a substantial number of plans, because many working owners are already included in plans that are covered by ERISA for other employees, see p. 10 and notes 4-5, *supra*, and because there are strong tax

incentives for working owners to participate in plans that also cover other employees, see 26 U.S.C. 401, 402, 404, 410(b), 501(a).

Moreover, to the extent that the decisions holding that working owners are not ERISA plan participants stand for the proposition that the plans themselves have two separate components, one covered by ERISA and the other not covered, the result is even more unworkable. Under the Internal Revenue Code, a pension plan is either tax-qualified or it is not; it is not meaningful to describe a plan as tax-qualified in part. The same is true under Title I of ERISA. Title I requirements, such as the duty to hold plan assets in trust and to manage those assets in accordance with ERISA fiduciary duties, apply to all the assets of the plan. Indeed, in traditional defined-benefit plans, in which plan assets are not held in individual accounts, it is impossible to apply ERISA fiduciary duties to only that portion of plan assets earmarked for employees other than working owners. Although it would be theoretically possible to hold that Title I of ERISA precludes working owners from even being covered by plans that cover non-owner employees, such a holding would put Title I of ERISA at war with the Internal Revenue Code as amended by Title II of ERISA, which not only allows but encourages joint participation.

3. A number of courts have tried to avoid treating working owners and their employees differently under ERISA by covering the owners as "beneficiar[ies]" under 29 U.S.C. 1002(8) rather than "participant[s]" under 29 U.S.C. 1002(7).[12] Those courts have reasoned that ERISA's definition of beneficiary is broad enough on its face to encompass working owners because it includes any "person designated * * * by the terms of an employee benefit plan[] who is or

[12] See, *e.g.*, *Gilbert*, *Wolk*, *Robinson*, *Peterson*, *supra*; *Harper* v. *American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990).

may become entitled to a benefit" under the plan. 29 U.S.C. 1002(8); see, *e.g.*, *Harper* v. *American Chambers Life Ins. Co.*, 898 F.2d 1432, 1434 (9th Cir. 1990).

That approach, however, has two fundamental flaws. First, it has no logical stopping point: anyone could be "designated * * * by the terms of an employee benefit plan" as a beneficiary, even when that person lacks any employment nexus with the plan sponsor. For instance, in *Hollis* v. *Provident Life & Accident Insurance Co.*, 259 F.3d 410, 415 (5th Cir. 2001), cert. denied, 535 U.S. 986 (2002), the court held that an independent contractor could be designated as a "beneficiary" under an ERISA plan, a result that is in considerable tension with this Court's decision in *Darden* that an independent contractor cannot be a plan "participant."

Second, the "beneficiary" theory would enable working owners to earn benefits only under welfare plans, and not under pension plans, because the ERISA provisions that create pension rights generally use the terms "employee" and "participant," not the term "beneficiary." See, *e.g.*, 29 U.S.C. 1002(2)(A), 1052, 1053. Although a participant in a pension plan may *have* a beneficiary, such as a surviving spouse, pension credits can only be earned on work performed by an employee; the entitlement of the beneficiary is purely derivative. See 29 U.S.C. 1055; *Boggs* v. *Boggs*, 520 U.S. 833, 846-847 (1997). Thus, a broad interpretation of "beneficiary" to include working owners cannot correct the anomalous results produced by an overly constricted interpretation of "participant" that excludes working owners.

E. The Department Of Labor Interprets ERISA To Permit Working Owners To Be ERISA Plan Participants

Based on the above considerations, the Department of Labor has concluded in an advisory opinion that working owners may be "participants" in ERISA plans. See Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Advisory

Opinion No. 99-04A (Feb. 4, 1999) (*reprinted in* App., *infra*, 1a-9a). The opinion carefully reviews the various provisions of ERISA discussed at pages 14-18 above, and concludes that, taken as a whole, they "reveal a clear Congressional design to include 'working owners' within the definition of 'participant' for purposes of Title I of ERISA." App., *infra*, 5a. The opinion further reasons that Congress would not have barred working owners from eligibility to participate in plans covered by Title I when it has long been established that they may participate in plans that qualify for favorable tax treatment under Title II and it is clear that they may participate in plans that qualify for termination insurance under Title IV. *Id.* at 7a-8a. As the considered view of the agency charged by Congress with the administration and enforcement of Title I of ERISA, the Department's advisory opinion reflects a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Although petitioners alerted the Sixth Circuit to the advisory opinion, the court did not discuss it. Instead, the court followed its own prior decisions in *Fugarino* and *Agrawal*, which had held that sole proprietors and sole shareholders may not be ERISA plan participants. See Pet. App. 5a-6a. The Sixth Circuit reached that result in those cases, however, based in large part on its misinterpretation of a Department of Labor regulation, 29 C.F.R. 2510.3-3(c)(1). See *Fugarino*, 969 F.2d at 185-186; *Agrawal*, 205 F.3d at 302-303 (following *Fugarino* but implying that *Fugarino* misread the regulation). The Sixth Circuit, like other courts of appeals that have held that sole proprietors and sole shareholders may not be ERISA plan participants, mistakenly read the regulation as providing a general definition of the statutory term "employee" that excludes sole shareholders, thereby precluding them from being plan

participants. See 969 F.2d at 185-186; *Kwatcher*, 879 F.2d at 961-962; *Giardono* v. *Jones*, 867 F.2d 409, 412 (7th Cir. 1989).

Contrary to that reading, as explained by the courts of appeals that have held that sole shareholders may be plan participants, the regulation does not define the statutory term "employee." Nor does it identify who is eligible to be a "participant" in a plan covered by Title I of ERISA. Rather, the regulation addresses what plans are covered by Title I of ERISA in the first place. See *Vega*, 188 F.3d at 294; *Madonia*, 11 F.3d at 449-450; see also *Gilbert* v. *Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1302-1303 (11th Cir. 2001).

The regulation as a whole is entitled "[e]mployee benefit plan," and its numbering, Section 2510.3-3, corresponds to Section 3(3) of ERISA, 29 U.S.C. 1002(3), the statutory definition of the term "employee benefit plan." Subsection (a) of the regulation explains its scope: it "clarifies the definition in section 3(3) of the term 'employee benefit plan' for purposes of title I of the Act." 29 C.F.R. 2510.3-3(a). Subsection (b) of the regulation, entitled "[p]lans without employees," provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan." 29 C.F.R. 2510.3-3(b). Subsection (b) explains, for example, that, although a "Keogh" or "H.R. 10" plan covering only partners or a sole proprietor will not be covered under Title I, "a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I." 29 C.F.R. 2510.3-3(b). Subsection (c) of the regulation is entitled "Employees" and states:

> For purposes of this section [*i.e.*, for purposes of the regulation defining a covered plan]:

> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and
>
> (2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. 2510.3-3(c)(1) and (2).

The regulation thus excludes from Title I coverage plans whose *only* participants are sole owners or partners and their spouses. Subsection (c) identifies who shall not be deemed an "employee" only for purposes of the regulation itself, which defines covered "plans," not covered "participants." Subsection (c) does not exclude sole owners or partners from the *statutory* definition of "employee" or from being participants in plans that also cover one or more employees who are not sole owners or partners and their spouses. As the Department of Labor explains in its advisory opinion, the regulation is thus fully consistent with the Department's view that working owners may be "participants" in ERISA plans. See App., *infra*, 8a n.7.[13]

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[13] The fact that the regulation does not provide a general definition of "employee" was made even more explicit in the regulatory preamble. The preamble explained that, in the proposed rule, the definition of "employee" had been located in 29 C.F.R. 2510.3-6, a provision whose numbering corresponded to Section 3(6) of ERISA, 29 U.S.C. 1002(6), the definition of "employee." Thus, the proposed rule had defined "employee" for all purposes under Title I. Comments on the proposed rule, however, raised concerns that the definition might preclude plans from paying benefits to self-employed individuals in plans that also covered other employees. In response, "the definition of 'employee' formerly appearing in proposed § 2510.3-6 [was] inserted into § 2510.3-3 and restricted in scope to that section." 40 Fed. Reg. 34,528 (1975).

F. Plan Participation By Working Owners Does Not Violate ERISA's Anti-Inurement Provision

The courts of appeals that have denied participant status to working owners have also mistakenly relied on ERISA's "anti-inurement" provision, 29 U.S.C. 1103(c)(1), which prohibits the assets of ERISA plans from inuring to the benefit of employers. That provision, those courts have reasoned, is transgressed if an owner is also a plan participant because then the owner, as a participant, may benefit from plan assets. See *Fugarino*, 969 F.2d at 186; *Kwatcher*, 879 F.2d at 959-960; *Giardono*, 867 F.2d at 411. The anti-inurement provision, however, does not preclude coverage of working owners as plan participants. It states that, with enumerated exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1). Accordingly, the provision expressly permits the payment of benefits to plan participants, and it does not address the separate question whether working owners may be participants.

Indeed, the anti-inurement provision in Title I of ERISA is based on the analogous exclusive benefit provision in the Internal Revenue Code, 26 U.S.C. 401(a)(2), which has never been understood to bar plan participation by working owners. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 302-303 (1974); pp. 16-17, 19-20, *supra*. The purpose of the anti-inurement provision, like ERISA's other fiduciary responsibility provisions, is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others. See, *e.g.*, *Prudential Ins. Co. of Am.* v. *Doe*, 76 F.3d 206, 209 (8th Cir. 1996). Those concerns are not implicated by paying benefits to working owners who participate on an equal basis in plans protected by other ERISA safeguards.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings, including resolution of the question whether respondent may set aside Dr. Yates' loan repayment to the plan as a preferential transfer under 11 U.S.C. 547(b) even though Dr. Yates' interest in the plan is excluded from the bankruptcy estate because it is protected by ERISA's anti-alienation provision, 29 U.S.C. 1056(d).

Respectfully submitted.

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AUGUST 2003

APPENDIX

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

[seal omitted]

Feb. 4, 1999

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Counts & Kanne
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99-04A
ERISA SEC.
3(7)

Dear Messrs. Counts and Potts-Dupre:

This is in response to your request for an advisory opinion containing the definition of "participant" provided in section 3(7) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether individuals who own business enterprises, either wholly or in part, and who provide personal services to those businesses may be "participants," within the meaning of section 3(7) of ERISA, in a multiemployer employee benefit plan. You state that the business enterprises that are the subject of this request include businesses that are operated as corporations, sole proprietorships, and partnerships.

You submit your request on behalf of the National Electrical Benefit Fund (the NEBF), a multiemployer pension plan established jointly by the International Brotherhood of Electrical Workers (IBEW) and the National Electrical Contractors Association (NECA) pursuant to collective bar-

gaining. You describe the NEBF as the largest construction industry fund in the United States, with approximately 375,000 participants, over 14,000 contributing employers, and plan assets of almost five billion dollars.

The documents that you have submitted indicate that an individual can become eligible to participate in the NEBF only as a result of an employer's having executed a participation agreement with the NEBF, obligating the employer to make contributions on behalf of at least some of its employees. *See* Restated Employees Benefit Agreement and Trust for the National Electrical Benefit Fund (hereinafter Trust Agreement), Part I, Provision 4; sections 1.7, 1.8, 1.18, 6.3.3. An employer must agree at a minimum to make contributions on behalf of its bargaining unit employees. *Id.* section 6.3.1. Such an employer may elect, in addition, to contribute on behalf of its "non-bargaining unit employees." An employer may contribute on behalf of all "non-bargaining unit employees" or only those non-bargaining unit employees who were formerly bargaining unit members ("alumni"). *Id.*

With respect to bargaining unit employees, a participating employer must contribute to the NEBF an amount equal to three percent of "all wages and other compensation paid to, or accrued by, the Covered Employees in the . . . bargaining unit for services performed for the Covered Employer." *Id.* section 6.2.1. For non-bargaining unit employees, the employer must contribute to the NEBF an amount equal to the lesser of

> "(a) 3% of all wages and other compensation which the Covered Employer would pay, or which the [non-bargaining unit] Covered Employees would accrue, if the Covered Employees were receiving the wage rate received by the highest number of employees in the appropriate . . . bargaining unit and working the normal straight time hours provided for in the appropriate labor agreement, or (b) 3% of all wages and other compensation paid to, or accrued by, the [non-bargaining unit] Covered Employees for services performed for the Covered Employer. . . ."

Id. Section 6.2.2.

The documents that you have supplied indicate that the NEBF provides a pension benefit, which may be paid as an early retirement pension or a normal retirement pension, and a disability benefit. A participant becomes vested in his or her pension benefit upon earning at least five vesting service credits.[1] Pension benefits for vested participants are calculated by multiplying the participant's benefit service credits[2] by fixed dollar amounts that are specified in the plan. As a result, the amount of a participant's monthly pension benefit is not dependent upon the participant's actual income prior to retirement or the actual amount of contributions that an employer made on his or her behalf, but rather upon seniority in the NEBF.

You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners"[3] to be treated as employees eligible to participate in the NEBF

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[1] One vesting service credit is earned for each year after 1965 in which a participant is credited with 1000 hours of covered service for covered employment (employment during a period for which an employer is obligated to make contributions for that employee).

[2] One benefit service credit is similarly earned for each year after 1965 in which a participant is credited with 1000 hours of covered employment.

[3] By the term "working owner," you apparently mean an individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

and therefore to become participants in the NEBF.[4] The eligible "working owners" include any "owner that earns wages or self-employment income from a company," including sole proprietors of unincorporated businesses. You indicate that the working owners who currently participate in the NEBF are journeyman electricians who had worked initially as bargaining unit members for other employers that contributed to the NEBF on their behalf. They subsequently acquired ownership interests in those employers or started their own electrical businesses, sometimes in partnership with other similarly situated individuals, sometimes by creating wholly-owned corporations, and sometimes operating as sole proprietors. They continue to work as electricians and in some cases employ other union members covered by the NEBF. Most of these working owners had earned vested pension benefits in the NEBF based on their previous service as bargaining unit employees, and they began accruing additional service credits when the NEBF changed its eligibility rules in 1994 to permit working owners to participate.

You represent that the employer's payroll reports, submitted monthly to the NEBF, are used to determine an employer's contributions, based on the working owner's reported "wages," and a working owner's service credits, based on the working owner's reported hours of service. You further represent that reporting employers determine a working owner's "wages" by determining the greater of the working owner's actual gross earnings subject to employment tax for that month or the amount the working

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[4] This current practice has been followed only since January, 1994. In the course of its history (since its creation in the early 1960's), the NEBF's practices have varied regarding participation by individuals who have equity ownership rights in business enterprises that operate in the industry covered by the IBEW.

owner would have earned if he had worked at normal straight-time hours for the month at the applicable journeyman's rate. The working owner's hours of service are reported as the actual hours the working owner worked for the business during the month.

Section 3(7) of Title I of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(6) in turn defines an "employee" as "any individual employed by an employer." Finally, section 3(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

Title I of ERISA contains multiple indications, albeit indirect, that Congress assumed that a "working owner" could be a "participant" in an employee benefit plan sponsored by the business in which that working owner held an ownership right, regardless of the legal form in which the business was operated. For example, section 401(a)(2) exempts certain partnership agreements from the fiduciary provisions of Part 4. This exemption would be meaningless if the partnership agreements themselves (which cover only partners, one of the categories of "working owners") were not otherwise plans covered by Title I. Further, section 403(b)(3)(A) specifically exempts from the trust requirement of section 403(a) a plan "some or all of the *participants* of which are employees described in section 401(c)(1) of the Code [emphasis added]." This exemption takes as its basis

the assumption that the employees described in Code section 401(c)(1), namely self-employed individuals (including "working owners"), are legitimate "participants" within the meaning of Title I. Also, section 408(b)(1) exempts from section 406's prohibition of specified transactions certain nondiscriminatory loans made to plan participants, including highly compensated employees, but section 408(d)(1) eliminates that exemption for owner-employees as defined in section 401(c)(3) of the Code. Inasmuch as the owner-employers described in Code section 401(c)(3) are sole proprietors and more than ten-percent partners, it is clear that the provisions in section 408 of Title I assume that such "working owners" are "participants" in the plans from which those loans would be made.

The indications of Congressional intent are supported and reinforced by the treatment of "working owners" under the provisions of Title II and Title IV of ERISA.[5] Section 401(c) of the Internal Revenue Code (the Code) provides that self-employed individuals are included as "employees" under Code section 401(a) to the extent that they have earned income "with respect to a trade or business in which personal services of the [individual] are a material income-producing factor." Code section 401(c)(2)(A). Code section 401(c) further imposes specific additional requirements on tax-qualified pension plans that provide benefits to "owner-employees," a term defined in Code section 401(c)(3) to include employees who own the entire interest in an unincorporated trade or business or more than 10 percent of a partnership. It is thus patently clear that Title II of ERISA

[5] Although we rely on certain provisions of Title II and Title IV in reaching the conclusions expressed in this opinion, nothing in this opinion should be construed as interpreting the provisions of those Titles that lie within the interpretive jurisdiction of the Department of the Treasury and the Pension Benefit Guaranty Corporation.

permits "working owners" to receive the tax benefits that flow from participation as "participants" in pension plans that meet the qualification requirements of Code section 401(a).

Title IV of ERISA (the termination insurance provisions) also expressly includes "working owners" among the "participants" who receive its protections. *See* ERISA section 4001(b)(1) ("[a]n individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of [Code] section 401(c)(1). . ."). Section 4021(b)(9) of ERISA excludes from coverage under Title IV only those pension plans that are "established and maintained exclusively for substantial owners," i.e., sole proprietors and more than ten-percent owners of partnerships and corporations. *See* ERISA section 4022(b)(5)(A) (defining "substantial owner"). Title IV limits the amount of benefits that the PBGC guarantees to "substantial owners" who participate in single employer plans, but nonetheless provides a basic guarantee of such owners' pension benefits. Such a guarantee would be meaningless if Title I did not permit such owners to be participants in ERISA-covered pension plans.

In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner-employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the

limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992).[6]

Therefore, it is the view of the Department that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan, including the NEBF, from extending plan coverage to "working owners," as described in your submission, where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provisions of Title I.[7]

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[6] In *Darden*, the United States Supreme Court held that the definition of "employee" provided in section 3(6) of Title I did not include an individual who was an independent contractor to the employer that established and maintained the plan. In reaching this conclusion, the Court first sought to determine whether ERISA contained any provision "either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.* at 323. Finding no guidance in the statute itself, the Court concluded that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 503 U.S. at 322. We follow here the Court's analysis in *Darden*, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat "working owners" as "participants."

[7] In its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "[a]n individual and his or her spouse . . . with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3(3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation.

ERISA's fiduciary standards, however, require compliance with any other applicable federal law. Pursuant to ERISA section 514(d), nothing in Title I of ERISA shall be construed to alter, amend, modify, invalidate, impair, or supersede any federal law or any rule or regulation issued pursuant to such federal law. Such federal laws include any requirements applicable to multiemployer benefit plans under the Labor Management Relations Act (LMRA). Several federal courts interpreting the LMRA have upheld decisions by plan trustees to exclude owner-employees on the ground that their inclusion would violate the LMRA. *See, e.g., Todd* v. *Benal Concrete Const. Co., Inc.*, 710 F.2d 581 (9th Cir. 1983); *Aitken* v. *GCU-Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979). The Department is not authorized to issue opinions regarding the LMRA. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" should seek legal advice regarding the propriety of the participation of "working owners" in such plans under the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Susan G. Lahne
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Division of Fiduciary
Interpretations
Office of Regulations and
Interpretations